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1283

No.

3624

1284

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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LOUISA PICKENS and JOHANNA SCHUTT,  
Appellants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA J.  
SCHMIDT, AMANDA KATZUNG, MINNIE  
S. FARNSWORTH, CORRINE LOVELAND  
and DON FERGUSON,

Appellees.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the Southern District of California,  
Southern Division.

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FILED

JAN 5 - 1921

F. D. MONOKTON,  
CLERK.





No.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys.**

For Appellants:

EMMET H. WILSON, Esq., 839 Title Insurance  
Building, Los Angeles, California.

For Appellees:

Messrs. HUNSAKER, BRITT & COSGROVE,  
1132-1143 Title Insurance Building, Los  
Angeles, California, and

J. H. MERRIAM, Esq., Central Building, Pasa-  
dena, California.



## CITATION.

UNITED STATES OF AMERICA, S.S.

*To*

J. H. Merriam, Eugene Wellke, Alma J. Schmidt  
and Minnie S. Farnsworth,

## GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 3rd day of September, A. D. 1920, pursuant to an order allowing an appeal filed and entered in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action numbered B-15 Equity, wherein Louisa Pickens and Johanna Schutt are complainants and appellants, and Charles F. Fensky is intervenor, complainant and appellant, and you, the said J. H. Merriam, Eugene Wellke, Alma J. Schmidt and Minnie S. Farnsworth, are defendants and appellees, and you are required to show cause, if any there be, why the judgment and decree in the said cause rendered against the appellants, as in the said order allowing appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Erskine M. Ross,  
Judge of the Circuit Court of Appeals for  
the Ninth Circuit, this 6th day of August,  
A. D. 1920, and of the Independence of the

United States, the one hundred and forty-fifth.

Erskine M. Ross  
U. S. Circuit Judge.

Endorsed: Receipt of a copy of the within citation is hereby admitted this 6th day of August, 1920. J. H. Merriam, Hunsaker, Britt & Cosgrove, Attorneys for Defendants and Appellees.

Filed Aug. 12, 1920. Chas. N. Williams, Clerk by P. W. Kerr, Deputy Clerk.

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IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT  
OF CALIFORNIA SITTING IN THE  
SOUTHERN DIVISION

Louisa Pickens and Johanna Schutt,	Complainants,
vs.	No. B. 15 Eq
J. H. Merriam, Eugene Wellke, Alma J. Schmidt, Amanda Katzung, Minnie S. Farnsworth, Corrine Loveland and Don Ferguson,	Defendants.

BILL OF COMPLAINT

The above named complainants say:

I.

That the complainant Louisa Pickens is now and has been for many years a citizen and resident of the State of Kansas, living in the City of Topeka, in that state, and that the complainant Johanna Schutt is now and has been for many years a citizen and resident of the State of Nebraska, living in the City of Omaha in that state; that the defendants and each of them

are citizens and residents of the State of California, and of the Southern District and Division thereof, and the real estate hereinafter described is situated in said state, district and division.

II.

That the amount in controversy herein exceeds the sum or value of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

III.

That the complainants are surviving sisters and heirs-at-law of one Ferdinand Fensky, who died intestate at San Pedro, Los Angeles County, California, on August 7, 1903, and bring this suit to recover their distributive shares of the estate of their deceased brother; that the said Ferdinand Fensky never had any children; that he left other heirs-at-law, besides the complainants herein, as follows: Jeanette Fensky, his widow (since deceased), Frederick Fensky, a brother, Ida Wendt, a sister (since deceased), Huldah Richter, a sister, Augusta Krauss, a sister, Charles Fensky, a brother, and George Fensky, a son of a brother who died during the life time of said intestate; that the said Ida Wendt died intestate subsequent to the death of Ferdinand Fensky, leaving a son, Conrad Wendt, as her sole heir-at-law; that after the death of the said Ferdinand Fensky and of the said Ida Wendt, and some years prior to the beginning of this suit, the said Conrad Wendt died unmarried, intestate and without issue or direct heirs, and each of the complainants as maternal aunt of the said Conrad Wendt succeed to one-seventh ( $1/7$ ) of the interest



of the said Ida Wendt in the estate of the said Ferdinand Fensky, and the property hereinafter described.

IV.

That at the time of his death Ferdinand Fensky was the owner of a large amount of real estate, all of which your orators for want of information are not able to describe, but, so far as known to your orators, is described as follows:

(A) A piece or parcel of land situated in the City of Los Angeles, California, being as follows: Commencing at a point on the West line of New High Street distant 200 feet Southwest from the Southwest corner of Alpine Street and New High Street; thence Southwesterly along the West line of New High Street 73 feet to a point; thence Westerly at right angles to said West line of New High Street 65 feet to a point; thence Northeasterly at right angles to the last mentioned course parallel with and distant from the West line of New High Street 73 feet to a point; thence 65 feet Easterly to the West line of New High Street to the point of beginning; being parts of Lots 10 and 11 in Block 33, of Ord's Survey, as recorded in Book 55, Page 66, Miscellaneous Records of Los Angeles County, California.

(B) Lots 19 to 29 inclusive in Block 3, Peck's Subdivision of the Carolina Tract in the City of San Pedro, Los Angeles County, California.

(C) Lots 9 and 10 of Peck's Subdivision of Lot 74 in said City of San Pedro, Los Angeles County, California.

(D) The West half of the Southwest quarter of the Northwest quarter of Section 24, Township 5, W. Range 10, S. in Orange County, California.

(E) The Southwest quarter of the Southeast quarter and the South half of the Northwest quarter of the Southwest quarter of Section 4, Township 5, W. Range 10, S. Orange County, California.

V.

That at the time of his death Ferdinand Fensky owned and possessed promissory notes executed by various persons aggregating about \$20,000.00 in face value and payable to him at various times, as stated in said notes.

A schedule of said notes is hereto attached, marked Exhibit A and made a part hereof.

On information and belief the complainants aver that the said Ferdinand Fensky owned other promissory notes payable to him and executed by various persons, but for want of information are unable to give a description of the same.

VI.

That at the time of his death various persons were indebted to the intestate on account of the purchase money on real estate sold by him to such persons; that at the times said real estate was sold the intestate executed to said purchasers contracts for deeds whereby he agreed to convey the real estate described therein upon the full payment of the purchase price, and at his death there was unpaid a large amount of such purchase price.

A schedule, showing such indebtedness, so far as known to complainants, is attached hereto, marked Exhibit B and made a part hereof; that on information and belief complainants aver that other persons were indebted to the said Ferdinand Fensky at the time of his death on account of similar transactions, but for want of sufficient information complainants are unable to give the details of such transactions.

#### VII.

That complainants are informed and believe that at the time of his death Ferdinand Fensky possessed cash in bank and in the hands of agents and attorneys, amounting to about \$10,000.00.

#### VIII.

That said real estate situated in the City of Los Angeles, California, at the time of intestate's death, was reasonably worth \$2500.00; that said real estate owned in San Pedro was then worth about \$14,000.00; that said real estate in Orange County was then worth about \$10,000.00; and that the whole of the property and estate owned and possessed by intestate, so far as complainants can ascertain the same, was then worth \$100,000.00.

#### IX.

That on October 15, 1903, by the consideration of the Superior Court of Los Angeles County, California, the said Jeanette Fensky was appointed and became administratrix of the estate of her deceased husband; that upon the death of Ferdinand Fensky, the said Jeanette Fensky came into the possession of a large sum of money in cash belonging to her deceased hus-

band, the exact amount of which is to the complainants unknown, but which on information and belief they aver to have been in excess of \$5,000.00; that she also came into possession of the promissory notes described in Schedule A, attached hereto, and also of other promissory notes, which, for want of information, complainants are unable to describe; and also came into possession of all of the evidences of indebtedness due to the said Ferdinand Fensky, but which the complainants are unable, for want of sufficient information, more fully to describe; that as such administratrix the said Jeanette Fensky came into possession of the real estate hereinbefore described, in the State of California; that well knowing the value thereof to be as hereinbefore alleged, and designing to deceive and defraud the complainants, and other heirs at law of her deceased husband, she caused the said California real estate to be falsely and fraudulently appraised and inventoried at a total sum of about \$6,000.00; that instead of returning to said Superior Court a true inventory of said personal property she inventoried but one promissory note for the sum of \$400.00, and, pursuing said design to mislead and defraud the complainants and other heirs of her deceased husband, purposely failed to list and inventory the said cash belonging to said intestate which came into her possession; also purposely failed to inventory the evidences of indebtedness due to her deceased husband from said purchasers of real estate; and also purposely omitted from said inventory a large amount of other real and personal property, which the com-



plainants for want of information are unable to describe; that said inventory was duly signed by the said Jeanette Fensky as such administratrix and was by her presented to said Superior Court as and for a true inventory of the estate of her deceased husband, when in truth and in fact the same was false and fraudulent as aforesaid, and intended by the said Jeanette Fensky to deceive the complainants as sisters of her deceased husband into the belief that his estate consisted of nothing but the property therein described and valued, and thereby induce them to relinquish their just claims to their respective shares thereof.

X.

That after the death of Ferdinand Fensky the said Jeanette Fensky, pursuing said design, sent all of said promissory notes and all of the evidences of indebtedness due to her deceased husband, to her agent and representative in the State of Kansas, one M. T. Campbell, who then and now resided and resides at Topeka, in Shawnee County, in that state; and entered into a fraudulent and collusive agreement with him that the said Campbell should act as her agent and representative in obtaining releases from complainants, and pursuant to such agreement, and for the purpose of carrying it out, procured the said Campbell, by virtue of certain proceedings in the Probate Court of Shawnee County, Kansas, a court of record having jurisdiction of the estates of deceased persons, to be and he was on September 9, 1903, appointed as a so-called administrator of the estate of the said Ferdinand Fensky; that on or about October 22, 1903,

the said Campbell filed in said probate court a pretended inventory represented by him to be "a true inventory of all the goods, chattels, rights and credits of Ferdinand Fensky, deceased, which are by law to be administered in Kansas, and also an inventory of the real estate of Ferdinand Fensky", and showing personal property amounting to \$20,927.64, consisting of \$4,297.14, cash in hand, and a part of the promissory notes described in Schedule A hereof, but wholly failed to list the note signed by W. C. Stein, and the note signed by Simms; that said Campbell purposely omitted from said inventory any reference to the indebtedness due said intestate from said purchasers; that the real estate sold by intestate and for which said purchasers were indebted to him, and, after his death, to his estate, is situated in and near said City of Topeka, and consisted in part of what is known as Fensky's First and Second Additions, about twelve acres in Kaw Reserve No. 5, Lot 61 on Kansas Avenue South, and part of Lot 71 on Kansas Avenue North; that the Kansas law regulating the descent and distribution of property, then as now, provided and provides that real estate of an intestate husband dying without children, descends directly to his widow, and no part of the same descends to his next of kin; that well knowing the provisions of said law and the foregoing facts, and pursuant to said fraudulent design and agreement, the said Jeanette Fensky and the said Campbell listed in said inventory, filed in said Probate Court, the real estate sold by intestate to said purchasers as real estate, and, knowing that none of the

contracts of sale of said real estate had been recorded, and knowing that complainants had no knowledge that said real estate had been sold, concealed the fact that such real estate had been sold, and by listing the same as real estate falsely represented to complainants that the real estate so sold belonged to said widow under said law and that complainants had no interest therein; that it was the duty of said widow and of said Campbell under the laws of both California and Kansas, to inventory and account for the indebtedness due from said purchasers as personal assets of said intestate distributable according to the law of California applicable to separate property of a deceased husband dying in that state, without issue, and leaving a widow and brothers and sisters; that for the purpose of carrying out said fraudulent design of securing from complainants by misrepresentation and fraud, a release of their lawful claims against the estate of their deceased brother, the said Jeanette Fensky and the said Campbell concealed the existence of the indebtedness due said estate from said purchasers, omitted from both said inventories said indebtedness and stated therein, and otherwise, that said real estate was actually Kansas real estate owned by intestate and as such descended to and belonged solely to said Jeanette Fensky.

## XI.

That under the laws of the State of Kansas, then and now in effect, where the vendee in a contract of sale of real estate dies without having executed a deed to the purchaser, upon the payment to the admin-

istrator of his estate of the unpaid balance of the purchase money the administrator is authorized, and may be directed by the Probate Court, to execute such deed with the same effect as though it had been executed by the vendor; that some time prior to his death the said Ferdinand Fensky and the said Jeanette Fensky drew up and signed deeds of conveyance to the several purchasers holding said contracts but did not deliver the same; that all of said undelivered deeds came into the hands of Jeanette Fensky upon the death of her husband; that well knowing that the execution by her or by the said Campbell as administrator of deeds to said purchasers would reveal the fact that said real estate had been sold and that the purchase money constituted personal property of said estate, the said widow and the said Campbell soon after their respective appointments began negotiations with the said purchasers to accept said undelivered deeds notwithstanding the death of said Ferdinand Fensky, and to execute to the said Jeanette Fensky mortgages for the amount of the unpaid purchase money due under said contracts of sale; that substantially all of the purchasers mentioned in Schedule B hereof, accepted said proposition, and, said deeds, all of which were dated prior to the death of the said Ferdinand Fensky, were by the said Jeanette Fensky, through the said Campbell, delivered to said purchasers and they executed to the said Jeanette Fensky mortgages for such unpaid balance of the purchase money; that said Jeanette Fensky and the said Campbell, still pursuing the aforesaid fraudulent design, omitted from their inventories



in Kansas any reference to said mortgages, and neither the said Jeanette Fensky in her lifetime, nor the said Campbell, nor anyone else, representing the estate of the said Fensky, has accounted to the complainants for any part or share of said mortgages, or the proceeds therefrom, and the same are as hereinafter related, unadministered assets of the estate of the said Ferdinand Fensky, deceased, in which these complainants have an interest as his heirs at law.

## XII.

That by means of said inventories filed by said Jeanette Fensky and said Campbell, and otherwise, they represented that the estate of the said Ferdinand Fensky consisted of property situated in California of the value of about \$6000 and of property in the hands of the said Campbell, amounting to about \$20,000, and represented that of this estate the widow Jeanette Fensky was entitled to one half and that the remaining half was subject to distribution among the other heirs at law of said intestate, so that, according to the inventories prepared by them, the widow would receive about \$10,000 from the property in the hands of the said Campbell, and about \$3,000 of property in her hands in California, and in addition thereto, that said widow was entitled to the real estate described in Campbell's inventory, situated in the State of Kansas; that in truth and in fact as said Jeanette Fensky and said Campbell well knew, the California real estate owned by said intestate at the time of his death was worth nearly \$30,000 and the personal property in California in the hands of the said Jeanette Fensky

was of the value of more than \$50,000, and in truth and in fact the personal property including that which the said Jeanette Fensky turned over to the said Campbell, for such pretended administration, in the State of Kansas, was of the actual value of nearly \$60,000; that almost immediately after the death of the said Ferdinand Fensky the said Campbell began the collection of monies due on account of the promissory notes set out in Schedule A, and also monies due from said purchasers; and prior to July, 1904, the said Campbell had collected of assets belonging to the estate of the said intestate, either in cash or in available mortgage notes, well secured, more than \$15,000; that from time to time the said Campbell, without the knowledge or consent of the complainants, remitted to said Jeanette Fensky large sums of money and retained other large sums of money in his hands for the purpose of carrying out the aforesaid design of securing for the said Jeanette Fensky the shares of the estate of their deceased brother, to which these complainants were justly entitled, that within a short time after the appointment of the said Campbell as such administrator, he represented to the complainants that it would take a long time to close up the estate of the said Ferdinand Fensky; that many of the promissory notes inventoried by him were of little or doubtful value; that the makers of said notes were accustomed to taking time for the payment of the same; that the costs of administration would amount to a considerable sum and that even if he should be able to collect said notes, that the shares of said estate to which each of the complainants ulti-

mately might be entitled would not exceed the sum of \$1,000; that the said Campbell further represented that the real estate in and near Topeka, Kansas, all went to the widow; that the property left by intestate was community property, to which the said Jeanette Fensky was entitled to one-half absolutely; and that if they wanted their shares, the said Jeanette Fensky would buy from the complainants their claims against said estate for \$1,000 each; that each and all of said representations were false, fraudulent and misleading, and were by the said Campbell and the said Jeanette Fensky, known to be false, fraudulent and misleading; that the said promissory notes were all good; that said intestate left no debts and there was no just reason why the estate should not be closed and final distribution made within a reasonable time; that the amount which each of the complainants was entitled to receive from said estate, upon a full disclosure and accounting, was more than \$8,000; that the said property left by said intestate was not community property, but was his separate property; that the costs of administration ought to have been comparatively small, and not exceeding the amount authorized by law; that the value of the estate was nearly \$100,000, instead of about \$26,000, as represented by said Campbell and said widow; that at the time the aforesaid representations were made these complainants had no knowledge of the actual facts as herein stated, but relied upon said inventories and the said representations made to them, and, believing the same, the complainant Louisa Pickens, on or about July 29, 1904, accepted the sum of

\$1,000 then paid to her by the said Campbell, and executed, and delivered to him for the said Jeanette Fensky, all of the right, title and interest of the said Louisa Pickens, in and to the property and estate of her said deceased brother; and on or about August, 3, 1904, the complainant Johanna Schutt, relying upon and believing the said inventories and the said representations made to her, accepted the sum of \$1,000 then paid to her by the said Campbell, and executed and delivered to him for the said Jeanette Fensky, a similar release and quitclaim releasing and conveying unto the said Jeanette Fensky all of the right, title and interest of the complainant Johanna Schutt in and to the property, assets and estate of her said deceased brother; that the \$1,000 so paid to each of the complainants as their full share of said estate, and for which they executed said releases and quitclaim deeds, is all that either of the complainants ever received from the estate of their deceased brother; that said sums were so paid to the said complainants by the said Campbell out of funds in his hands collected from the assets of the said estate; that the said Jeanette Fensky did not advance or pay anything whatever for said releases and quitclaims; that the \$1,000 each received by said complainants was only a part of the money then due to them respectively from said estate and the said Jeanette Fensky parted with nothing of value for said releases and quitclaims; that said instruments, and each of them, are ineffective and without consideration and are wholly fraudulent and void, for that, the same were secured from these



complainants, and each of them, upon the faith of the aforesaid false, fraudulent and misleading misrepresentations, statements and representations, made by the said Jeanette Fensky and the said Campbell; that if the complainants had known or had had any suspicion of the truth, neither of them would have executed said release and quitclaim, but would have insisted upon receiving their full share of said estate.

### XIII.

That prior to March 30, 1905, the said Campbell remitted to the said Jeanette Fensky about \$35,000 in cash and secured notes, being proceeds of the assets of the estate of the said intestate which came into his hands; that on or about March 30, 1905, the said Jeanette Fensky filed in the Superior Court of Los Angeles County, California, a pretended final account, in which she represented that she had secured the interests of all of the brothers and sisters and other heirs at law of her deceased husband, and that she was the only one entitled to said estate; that there being no debts due from the said intestate, and no opposition to said pretended final account, the same was received and approved by said Superior Court and an order entered discharging the said Jeanette Fensky as such administratrix, and closing said estate; that said Jeanette Fensky thereupon caused said deeds of release and quitclaim to be filed of record in Los Angeles County, and in Orange County, California, and upon the faith of the same secured purchasers of the property in Orange County, California, and also of some of the property in San Pedro, California,

realizing therefrom more than \$26,000; that with the money and mortgages received from the said Campbell in the circumstances aforesaid, and the money derived from the sale of said California real estate, the said Jeanette Fensky purchased real estate in Los Angeles County, California, and at the time of her death in 1909 was the owner of the following described real estate, to-wit:

Item 1.

The North 66 feet of the East 200 feet of Lot 80, L. H. Michner's Subdivision of the North 38 acres in Block U of Painter & Ball's Addition to Pasadena, California;

Item 2.

Lot 6 in Block A New Fair Oaks Avenue Tract, Pasadena, California.

Item 3.

Lot 12 of A. F. Mill's Subdivision of the North half of Lot 6 of the Berry & Elliott Tract, Pasadena, California.

Item 4.

That portion of Lot "O" of the San Pasqual Tract in Pasadena, California, described as follows: Beginning at a point in the East line of Lot Four, distant one hundred thirty-two feet South from the Northeast corner thereof; thence West parallel with the North line of said lot two hundred feet to the East line of Magnolia Avenue one hundred feet; thence East parallel with the North line of said lot two hundred feet to the East line thereof; thence along the last mentioned line one hundred feet to the place of beginning.

Item 5.

Lot 2 of the F. E. Crawford Tract in Pasadena, California.

Item 6.

Lot 16 of S. H. Doolittle's Subdivision of Lot 21 of B. F. Ball's Subdivision of Pasadena, California.

Item 7.

Lot 10 Peck's Subdivision of Block 74 in San Pedro, California.

Item 8.

A piece of property on New High Street, in the City of Los Angeles, County of Los Angeles, State of California, described as follows: Commencing at a point on the West line of New High Street, distant 200 feet Southwest from the Southwest corner of Alpine Street and New High Street; thence Southwesterly along the West line of New High Street 73 feet to a point; thence Westerly and at right angles to said West line of said New High Street 64 feet to a point; thence Northeasterly and at right angles to said last mentioned course and distant and parallel with the West line of New High Street 73 feet to a point; and, thence Easterly by a straight line 65 feet to the West line of New High Street to point of beginning or commencement, being parts of lots 10 and 11, in Block 33 of Ord's Survey, according to the map in Book 53, Page 68, Miscellaneous Records of Los Angeles County, California.

Item 9.

The portion of Lot 21 of A. F. Mill's Subdivision of the North half of Lot 6 of the Berry & Elliott Tract

in Pasadena, California, beginning at the Northwest corner of said lot; thence East along the South side of Colorado Street 25 feet; thence South one hundred thirty-two and seventy-five hundredths feet to an alley; thence West 25 feet; thence North one hundred and thirty-two and seventy-five hundredths feet to the place of beginning, except a strip twelve and seventy-five hundredths feet wide off the North side, now a part of Colorado Street.

Item 10.

The South fifty feet of the North one hundred feet of Lot Eight, and the South fifty feet of the North one hundred feet of the West ten feet of Lot Seven of L. A. Michner's Subdivision of Lots Fourteen to Seventeen, both inclusive, of the Summit Avenue Tract, in Pasadena, California.

Item 11.

Lot 24 of Mary H. Newton Tract in Pasadena, California.

Item 12.

Lot 7 in Block A of G. Weingarth's Subdivision B of the San Gabriel Orange Association lands in Pasadena, California.

That prior to her husband's death the said Jeanette Fensky had no money or property, whatever, and all the property, including the said Pasadena real estate, owned by her at the time of her death, was acquired by the use of money and assets belonging to her husband's estate, and which came into her hands in the circumstances hereinbefore alleged.



## XIV.

That the said Jeanette Fensky died on July 8, 1908; that prior to her death and on or about September 18, 1907, the said Jeanette Fensky, without any consideration therefor, executed and delivered a deed purporting to convey the property hereinbefore described, situated on New High Street in the City of Los Angeles, California, to the defendant Amanda Katzung; and on the same day, without consideration, executed a deed purporting to convey to said Amanda Katzung said Lot 10 in Peck's Subdivision of San Pedro, California; that at or about the same time, without consideration, the said Jeanette Fensky executed a deed purporting to convey to the defendant Eugene Wellke, real estate situated in the State of Kansas; that with the funds received from the said Campbell, in the circumstances hereinbefore related, and with the funds arising from the sale of said Orange County property, the said Jeanette Fensky, on or about May 28, 1907, purchased the North sixty feet of the East two hundred feet of Lot 8 in Michner's Subdivision of the Northeast 38.86 acres in Block U, T. & B. Addition to Pasadena, California, and on the same day signed a deed purporting to convey to the defendant Alma J. Schmidt, said last mentioned property; that on or about August 1, 1908, on the petition of the defendants Eugene Wellke, Amanda Katzung and Alma J. Schmidt, the defendant J. H. Merriam was appointed by the Superior Court of Los Angeles County, California, administrator of the estate of the said Jeanette Fensky; that in said petition it is alleged that the

whole of the property of the said Jeanette Fensky at the time of her death consisted of about \$2,300 in money; that for some time after his appointment the said J. H. Merriam took no steps whatever looking to the administration of the estate, but on September 8, 1909, he filed in said matter a pretended inventory from which it appears that the total assets of the estate of the said Jeanette Fensky amounted to about \$3,500, consisting of \$2,324.38 in money, a claim against the defendant Amanda Katzung and a note of the defendant Don Ferguson, amounting to \$1,050; that upon the coming in of said inventory and on September 8, 1909, the defendant J. H. Merriam filed a purported final account of said estate, and in said purported final account represented that property of the intestate in course of administration in the Probate Court of Shawnee County, Kansas, had been wholly administered and distributed; and further represented that the said Jeanette Fensky left as her sole heirs at law the defendants Eugene Wellke, Amanda Katzung, and Alma J. Schmidt;

Complainants aver that at the time the said pretended final account was filed by the said J. H. Merriam, he knew that the said Jeanette Fensky at the time of her death owned the real estate hereinbefore described; and knew that the same was distributable among the heirs at law of Ferdinand Fensky, the deceased husband of the said Jeanette Fensky, and knew that neither the said Eugene Wellke, nor the said Amanda Katzung, nor the said Alma J. Schmidt had any interest whatsoever in the same; that as the said

Merriam well knew, some time prior to her death the said Jeanette Fensky made out and signed deeds purporting to convey the property owned by her as follows:

A deed to Alma J. Schmidt of the real estate described herein as Item 1 of the real estate owned by Jeanette Fensky at the time of her death;

A deed to Eugene Wellke of the real estate described in Item 2;

A deed to Minnie S. Farnsworth of the real estate described in Item 3;

A deed to the defendant Eugene Wellke of the real estate described in Item 4;

A deed to the defendant Amanda Katzung of the property described in Item 5;

A deed to the defendant Alma J. Schmidt of the real estate described in Item 6;

A deed to the defendant Amanda Katzung of the real estate described in Item 7;

A deed to the defendant Amanda Katzung of the property described in Item 8;

A deed to the defendant Eugene Wellke of the real estate described in Item 9;

A deed to the defendant Corrine Loveland of the property described in Item 10;

A deed to the defendant Eugene Wellke of the property described in Item 11;

A deed to the defendant Eugene Wellke of the property described in Item 12;

That all of said deeds so made out by the said Jeanette Fensky were not delivered to the respective gran-

tees named therein until after the death of the said Jeanette Fensky; that the title and ownership of said property did not pass to the said grantees; and, at the time of her death the said Jeanette Fensky was the owner of the same; that the said J. H. Merriam well knowing all the foregoing facts, wholly omitted said property from his inventory and accounts, and pretended to make distribution of the estate of the said Jeanette Fensky, and paid over to each of the defendants Eugene Wellke, Amanda Katzung and Alma J. Schmidt, \$235.61, out of the assets and also turned over to them certain notes belonging to the said Jeanette Fensky, and certain other property, which these complainants are unable more particularly to describe; On information and belief complainants aver that the said J. H. Merriam, while pretending to act as administrator of the estate of the said Jeanette Fensky, was employed by and acted as attorney and agent for, the defendants Eugene Wellke, Amanda Katzung, Corrine Loveland, Minnie S. Farnsworth, and Alma J. Schmidt, with full knowledge of the rights of the complainants herein, and with the purpose and design of preventing them from securing their just share of said estate of their deceased brother; that the said J. H. Merriam, although requested so to do, has made no effort to represent said estate, and have the administration thereof continued by said Superior Court of Los Angeles County, California, and has failed, refused and neglected to further administer the same, and pretends to deny the rights of these complainants in respect thereof.



## XV.

That all of the estate of the said Ferdinand Fensky was his separate property, and as such upon the death of his widow, the said estate and its avails, descended ratably to the surviving brothers and sisters of the said Ferdinand Fensky, and not to the sisters and brother of the said Jeanette Fensky; that these complainants have not received from the estate of their deceased brother anything, except the said \$1,000 each, paid to them by the said M. T. Campbell in the circumstances hereinbefore related; that the defendant Minnie S. Farnsworth is a daughter of the said defendant Eugene Wellke, and claims to be the owner of the property described in Item 3 by virtue of said undelivered deed; that the defendant Don A. Ferguson, by virtue of a deed executed to him by Jeanette Fensky, claims to be the owner of the real estate described in Item 3 hereof; that Corrine Loveland claims an interest in the real estate described in Item 10 hereof, by virtue of an undelivered deed as hereinbefore alleged; that whatever right, title or interest the defendants or either of them have or claim to have in any of said property of the said Jeanette Fensky, is subject to the claims of these complainants as heirs at law of the said Ferdinand Fensky, and of the said Jeanette Fensky, both deceased.

## XVI.

Complainants aver that until late in the Summer of 1912, they did not, nor did either of them, have any notice, knowledge or suspicion of the truth respecting the amount, extent and value of the estate of their

deceased brother, nor of the frauds and fraudulent conduct of the said M. T. Campbell, the said Jeanette Fensky, and the said J. H. Merriam, nor did either of them have any notice, knowledge or suspicion of the truth respecting the undelivered deeds made by the said Jeanette Fensky in her life time, to the defendants herein, as heretofore stated; that during the month of July, 1912, one of the daughters of the complainant Louisa Pickens, while visiting in Los Angeles, California, accidentally secured access to the correspondence between the said M. T. Campbell and the said Jeanette Fensky, which disclosed to said daughter a part of the truth relative to the estate of Ferdinand Fensky, and the dealings of the said Campbell and the said Jeanette Fensky in reference thereto; that the undelivered deeds signed by the said Jeanette Fensky were recorded a few days after her death, but were made and acknowledged several months before she died; that until in the early part of 1913 neither of the complainants had any notice or knowledge that said deeds were not delivered during the life time of Jeanette Fensky, although the complainants had knowledge of the contents of the inventories filed by the said Campbell, the said Jeanette Fensky and the said Merriam; that these complainants, through their children and otherwise, during the pendency of the proceedings in said probate court of Shawnee County, Kansas, and during the pendency of the proceedings in the Superior Court of Los Angeles County, California, involving the administration of the estate of

the said Ferdinand Fensky and of the said Jeanette Fensky, paid attention to said proceedings, and from time to time secured copies of papers that were filed therein; that none of said papers and none of the records disclosed the truth as your complainants now aver it to be, and their present knowledge concerning the extent and value of the estate of their deceased brother, and of the facts relating to the estate of the said Jeanette Fensky has been secured since the discovery of the correspondence between the said Campbell and the said Jeanette Fensky, which aroused the suspicions of complainants and caused them to and they have used extraordinary efforts to learn the facts. And complainants aver that they believed the statements contained in the said inventories and believed the representations made to them by the said Jeanette Fensky, and by the said Campbell and by the said Merriam; and aver that except for such representations they would not have released the estate of said Ferdinand Fensky from their just claims, but would have enforced the same.

The Premises Considered, the complainants pray as follows:

1.

That an account be taken of all of the property of the said Ferdinand Fensky, deceased, owned or possessed by him at the time of his death, and that it be determined and adjudged by this court that the same was his separate estate and distributable as such under the laws of the State of California.

## 2.

That the pretended deeds of release and quitclaim executed by these complainants to the said Jeanette Fensky be declared fraudulent and void, and of no effect and that the same be adjudged not to estop these complainants or either of them from claiming their respective shares of the estate of the said Ferdinand Fensky.

## 3.

That an account be taken of the property and estate of the said Jeanette Fensky and the sources from which the same was derived, and that upon final hearing it be determined that all of the property owned by her at the time of her death is distributable among the heirs at law of the said Ferdinand Fensky, deceased; and that neither the defendant Eugene Wellke nor the defendant Amanda Katzung nor the defendant Alma J. Schmidt, have any interest whatsoever in said property or any part of the same.

## 4.

That it be determined by this court that the pretended deeds under which the defendants Wellke, Katzung, Schmidt, Farnsworth, Ferguson and Loveland claim, are wholly invalid and void, and that neither of said persons has any right, title or interest whatever in, to, or about the said estate, or any part of the same.

## 5.

That the defendant J. H. Merriam be required to account to these complainants for their distributive shares of the estate of the said Jeanette Fensky, which



came into his hands and which was by him distributed to the said Wellke, Katzung and Schmidt.

6.

The complainants pray that in the event it shall be ascertained by the court, upon further proceedings herein, that other persons have or claim to have some interest in the estate of the said Ferdinand Fensky, that these complainants have leave to bring in said persons, and that any other of the heirs at law of the said Ferdinand Fensky, applying therefor, may be made parties hereto, to the end that the rights of all of the persons having or claiming to have any interest in said estate, may be ascertained and determined.

7.

The complainants pray for such other, further and general relief as to the court may seem equitable and just.

Davis, Kemp & Post

D. R. Hite

Solicitors for Complainants.

## SCHEDULE

### A

		Amount
1.	A note signed by one Stein	\$2400 00
2.	" " " " " Simms	325 00
3.	" " " " " M. & C. Millice	1500 00
4.	" " " " " J. W. & E. Rigdon	30 50
5.	" " " " " A. & J. Bauch	200 00
6.	" " " " " J. A. & B. Lukens	100 00
7.	" " " " " Lukens Bros. & their wives	900 00
8.	" " " " " W. R. Mitchell & wife	2000 00

9.	"	"	"	"	"	H. & H. & F. & E. & H. Buchanan	1500 00
10.	"	"	"	"	"	W. C. & V. Stadel	100 00
11.	"	"	"	"	"	" " " " "	250 00
12.	"	"	"	"	"	M. & J. W. Strump	165 00
13.	"	"	"	"	"	E. & A. Wardell	1350 00
14.	"	"	"	"	"	J. & K. Petri	400 00
15.	"	"	"	"	"	John Coster	1500 00
16.	"	"	"	"	"	J. & L. Bauch	300 00
17.	"	"	"	"	"	J. H. Foucht	800 00
18.	"	"	"	"	"	A. J. Hutchinson	550 00
19.	"	"	"	"	"	John Sheetz	400 00
20.	"	"	"	"	"	E. D. Jones & wife	500 00
21.	"	"	"	"	"	F. A. Root & wife	500 00
22.	"	"	"	"	"	J. E. & L. Bauch	700 00
23.	"	"	"	"	"	G. & L. & G. Stokes	700 00
24.	"	"	"	"	"	P. Hamschild & wife	150 00

## SCHEDULE B.

Showing date of contract of sale, name of purchaser, description of property sold in Topeka, Kansas, amount of purchase price, and amount unpaid at time of Ferdinand Fensky's death.

Date	Purchaser	Property sold Fensky's Addition	Street	Purchase Price	Amt. Unpaid.
11 15 00	M. Etzel	9, 10	Locust	704 00	514 00
11 15 01	John Sell	48, 50	Lake	715 00	598 00
11 15 01	Jos. Walker	35, 37, 39	Locust	1209 45	684 00
7 10 00	John Dietz	9, 11	Lake	500 00	243 00
8 1 01	G. A. Baxter	28, 30, 32	Lake	915 00	696 00
9 15 01	E. H. Stamm	24, 26	Lake	200 00	110 00
8 1 01	Louis Schaeffler	60, 62	Lake	915 00	969 00
8 1 01	George Hammerick	18, 20, 22	Lake	800 00	587 18
8 1 01	A. Meder	23, 25, 27	Locust	630 00	525 00
8 1 01	John Donne	12, 14	Chandler	840 00	745 00
8 1 01	George Brosamer	65, 67, 69	Locust	1500 00	1089 00
8 1 01	Reed Saylor	19, 21	Locust	900 50	860 00

8	1	01	W. L. Haven	42, 44, 46	Lake	970 00	750 00
8	1	01	C. Van Laeys	51, 53	Locust	800 00	615 00
8	1	01	George Lippert	48, 50	Chandler	660 00	300 00
8	1	01	B. S. Dustin	62, 64	Chandler		275 00
8	1	01	M. G. Tracy	47, 49, 51	Lake		510 00
8	1	01	J. H. Brosamer	64, 66, 68 & 70	Lake		800 00
8	1	01	Jacob Fink	41, 43, 45	Lake		209 00
8	1	01	M. S. Grant	25, 27	Lake		640 00
SCHEDULE B (Continued)							
8	1	01	Wesley Sagar	12, 14, 16	Lake		860 00
8	1	01	John H. Sell	48, 50	Lake		1040 00
8	1	01	George Jammer	29, 31, 33	Lake		912 00
8	1	01	Frank Gutsch	52, 54	Lake		660 00
8	1	01	Casper Gettig	9, 11	Locust		450 00
8	1	01	Sarah Rost	61	Kan. Ave.		4200 00
8	1	01	H. S. Priessner	71	Kan. Ave.		2200 00
8	1	01	W. E. Gibbons	6, 8, 10	Lake		900 00
8	1	01	Henry Franks	1, 3	Locust		540 00
8	1	01	Frank Sawyer	1, 3	Lake		430 00



Endorsed: Filed Jul 8 1914. Wm. M. Van Dyke,  
Clerk By R. S. Zimmerman Deputy Clerk

Davis, Kemp & Post, D. R. Hite Solicitors for Com-  
plainants 812 Marsh Strong Bldg, Los Angeles.

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[TITLE OF COURT AND CAUSE.]

STIPULATION TO OMIT CERTAIN MATTERS  
FROM PRINTED TRANSCRIPT OF REC-  
ORD ON APPEAL.

To the end that unnecessary repetition of documents  
in the printed record on appeal be avoided and the  
said record be reduced in length to as great an extent  
as is possible,

IT IS HEREBY STIPULATED by and between  
the respective parties hereto, by their respective solici-  
tors, as follows:

1. That there are annexed to and made a part of  
the joint amended answer filed herein by the defend-  
ants, Eugene Wellke, Alma J. Schmidt and Minnie  
S. Farnsworth, copies of the following papers and  
documents, copies of which are also set forth at length  
in the condensed statement of the evidence herein,  
to wit:

(a) The inventory and appraisement in the matter  
of the estate of Ferdinand Fensky, deceased, in the  
Superior Court of the State of California, in and for  
the County of Los Angeles, the same being marked  
"Exhibit No. 1" in the said amended answer, and  
designated in the said statement of the evidence as  
"Plaintiffs' Exhibit No. 18";

(b) The inventory and appraisalment in the matter of the estate of Jeanette Fensky, deceased, in the said Superior Court, the same being marked "Exhibit No. 2" in the said amended answer, and designated in the said statement of the evidence as "Plaintiffs' Exhibit No. 21".

2. That there is also annexed to and made a part of the said joint amended answer filed herein by the said defendants, Eugene Wellke, et al., a copy of the second amended complaint in intervention of Louisa Pickens and Johanna Schutt, in that certain action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Minnie S. Farnsworth and Eugene Wellke, Plaintiffs, vs. Don Ferguson, Amanda Katzung and Alma Schmidt, Defendants, the same being marked "Exhibit No. 3" in the said amended answer.

3. That the defendant, J. H. Merriam, answered separately and filed herein an amended answer, to which are annexed and made a part thereof, copies of the same papers and documents mentioned in paragraphs 1 and 2 of this stipulation that are annexed to the said joint amended answer of the defendants, Eugene Wellke, et al.

4. That there are annexed to and made a part of the joint supplemental answer filed herein by the said defendants, Eugene Wellke, Alma J. Schmidt and Minnie S. Farnsworth, copies of the following papers and documents in a certain action in the District Court of Shawnee County, Kansas, entitled Louisa Pickens and Johanna Schutt, Plaintiffs, vs. M. T. Campbell,

Thomas Page and E. C. Arnold, Defendants, which papers and documents are marked as exhibits in the said supplemental answer as follows:

- (a) Petition (Exhibit 1);
- (b) Separate answer of defendant, M. T. Campbell (Exhibit 2);
- (c) Separate answer of defendant, Donald A. Campbell, as administrator with the will annexed of the estate of M. T. Campbell, deceased, (Exhibit 3);
- (d) Plaintiffs' reply to the answer of Donald A. Campbell, as administrator with the will annexed of the estate of M. T. Campbell, deceased, (Exhibit 4);
- (e) Memorandum of decision of the said District Court (Exhibit 5).

5. That all of the papers and documents mentioned and referred to in paragraph 4 of this stipulation are set forth at length in the condensed statement of the evidence herein and are contained in the exhibit designated in the said statement as "Defendants' Exhibit No. E-1".

6. That there is also annexed to and made a part of the said joint supplemental answer filed herein by the said defendants, Eugene Wellke, et al., a copy of the decision of the Supreme Court of Kansas made and rendered in the action entitled Louisa Pickens, et al., vs. M. T. Campbell, et al., hereinbefore referred to, on appeal from the judgment of the District Court of Shawnee County, Kansas, the same being marked "Exhibit 6" in the said supplemental answer and being designated in the said statement of the evidence as "Defendants' Exhibit No. F-1".

7. That the said defendant, J. H. Merriam, filed herein a separate supplemental answer to which are annexed and made a part thereof, copies of the above mentioned papers and documents that are annexed to the said supplemental answer of Eugene Wellke, et al., and mentioned and referred to in paragraphs 4 and 6 of this stipulation.

8. That the above mentioned papers and documents, annexed to the said amended answers, designated as (a) and (b) in paragraph 1 of this stipulation, and all of the papers and documents annexed to the said supplemental answers and referred to in paragraphs 4 and 6 of this stipulation, shall be printed in the transcript of the record on appeal in their respective proper places in the condensed statement of the evidence, and the same shall not be printed in connection with either of the said amended answers or with either of the said supplemental answers.

9. That the said separate supplemental answer of the defendant, J. H. Merriam, is identical in words and figures with the said joint supplemental answer of the defendants, Eugene Wellke, et al., and that the said supplemental answer of the defendant, J. H. Merriam, shall not be printed in the transcript of the record on appeal.

10. That Exhibit No. 3, annexed to the said joint amended answer of the defendants, Eugene Wellke, et al., referred to in paragraph 2 of this stipulation, shall be printed in the transcript of the record on appeal in connection with the said amended answer, but the same shall not be printed in connection with



the said amended answer of the defendant, J. H. Merriam.

11. That the captions of all pleadings and papers filed in this action shall be omitted from the printed transcript of the record on appeal, except the subjects of the respective pleadings and papers; that all endorsements on the backs or covers of pleadings and papers shall be omitted from the said printed transcript, except the endorsements showing the service and the filing thereof.

12. That this stipulation shall be printed in the transcript of the record on appeal.

DATED this 30th day of Sept., 1920.

Emmet H. Wilson,

Solicitor for Complainants and  
Intervenor, Appellants.

Hunsaker, Britt & Cosgrove,

Robert B. Murphey,

J. H. Merriam,

Solicitors for Defendants and  
Appellees.

Endorsed: Receipt of a copy of the within is hereby  
admitted this.....day of August, 1920.  
attorney for.....

Filed Oct. 4, 1920. Chas. N. Williams, Clerk; By  
P. W. Kerr, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

AMENDED ANSWER OF DEFENDANTS EUGENE WELLKE, ALMA J. SCHMIDT AND MINNIE S. FARNSWORTH.

Come now the defendants Eugene Wellke, Alma J. Schmidt, and Minnie S. Farnsworth in the above entitled action, and severing from each of the other defendants above named, for their separate answer to the bill of complaint of complainants (amended and filed pursuant to the stipulation herein entered into between these defendants and complainants above named), jointly and severally admit, allege and deny as follows:

FIRST SEPARATE DEFENSE.

1. Admit that they, and each of them, are citizens and residents of the state of California, and of the southern district and division thereof, and that the real estate in said bill of complaint described is situate in said state, district and division. Allege that they, and each of them, are without knowledge respecting any of the other matters or things alleged in paragraph I of said bill of complaint.

2. Allege that they, and each of them, are without knowledge respecting any of the matters or things contained in paragraph II of said bill of complaint.

3. Admit that the said Ferdinand Fensky, in said bill of complaint mentioned, never had any children. Allege that they, and each of them, are without knowledge respecting any of the other matters or things

contained in said paragraph III of said bill of complaint.

4. Admit that at the time of his death the said Ferdinand Fensky was the owner of each and every the parcels of land described, or attempted to be described, in paragraph IV of said bill of complaint, but deny that at the time of his death the said Ferdinand Fensky was the owner of a large, or any, amount of real estate other than the said parcels of land in said paragraph IV described, or attempted to be described. Allege that the parcel of land in said paragraph IV designated as (B) is incorrectly and improperly described therein, and that the true and correct description thereof is as follows, to wit: "Lots 19 to 29, inclusive, in block "C" of Peck's Subdivision of the Carolina Tract in the city of San Pedro, Los Angeles County, California". Allege that the parcel of land in said paragraph IV designated as (D) is incorrectly and improperly described therein, and that the true and correct description thereof is as follows, to wit: "The west half of the southwest quarter of the southwest quarter of section 24, township 5 south, range 10 west, in Orange County, California." Allege that the parcel of land in said paragraph IV designated as (E) is incorrectly and improperly described therein, and that the true and correct description thereof is as follows: "The southwest quarter of the southwest quarter and the south half of the southwest quarter of the southeast quarter of section 4, township 5 south, range 10 west, in Orange County, California."

5. Allege that at the time of his death said Ferdinand Fensky owned and possessed a certain promissory note in the principal sum of \$400.00 theretofore made and executed by one F. C. Richter in favor of and payable to the said Ferdinand Fensky, and that said promissory note constituted one of the items of property belonging to the estate of said Ferdinand Fensky upon his death, and was included and listed in the inventory and appraisement filed in the matter of the estate of said Ferdinand Fensky in the Superior Court of the county of Los Angeles, state of California, as hereinafter alleged. Allege that they, and each of them, are without knowledge respecting any of the other matters and things contained in paragraph V of said bill of complaint and in the schedule therein referred to and attached to said bill of complaint, marked "Exhibit A" and made a part thereof.

6. Allege that they, and each of them, are without knowledge respecting any of the matters or things contained in paragraph VI of said bill of complaint and in the schedule thereunto attached, marked "Exhibit B" and made a part thereof.

7. Allege that they, and each of them, are without knowledge respecting any of the matters or things contained in paragraph VII of said bill of complaint.

8. Deny that the said real estate situate in the city of Los Angeles, California, at the time of said Ferdinand Fensky's death was reasonably, or at all, worth the sum of \$2,500.00, or any other or larger sum than the sum of \$600.00. Deny that said real estate owned in San Pedro was then worth about \$14,000.00, or any



other or larger sum than the sum of \$3,600.00. Deny that said real estate in Orange County was then worth about \$10,000.00, or any other or larger sum than \$2,000.00. Deny that the whole of the property and estate within the state of California owned and possessed by the intestate was then worth \$100,000.00, or any other or larger sum than \$6,700.00. Allege that they, and each of them, are without knowledge respecting any of the other matters or things contained in paragraph VIII of said bill of complaint, and in particular that they are without knowledge respecting the value of any property or estate that may have been left by said intestate, if any such property was so left, other than that within the state of California.

9. Admit that on October 15, 1903, by the consideration of the superior court of Los Angeles County, California, the said Jeanette Fensky was appointed and became administratrix of the estate of said Ferdinand Fensky, her deceased husband, and admit that as such administratrix the said Jeanette Fensky came into possession of the real estate in the state of California in said paragraph IV of said bill of complaint described, or attempted to be described. Allege that the said Jeanette Fensky as such administratrix did on the 26th day of October, 1903, make and file in the said superior court an inventory of property belonging to the estate of the said Jeanette Fensky, a copy of which said inventory is hereunto attached and marked Exhibit No. 1, and which is hereby referred to and made a part hereof. Allege that in and by said inventory it was, and is, declared that the said property

therein described was community property of the said Ferdinand Fensky, deceased, and of the said Jeanette Fensky, and the said property was therein designated and described as such community property. Allege that they, and each of them, are informed and believe, and they therefore allege, that within a short time after the filing of the said inventory the complainants herein, and each of them, had actual notice of the contents thereof, and in particular of the description of the several items of property therein inventoried, and of the respective amounts at which the said items were severally appraised therein, and of the fact that the said property, and the whole thereof, was in and by said inventory declared to be, and described as, the community property of the said Ferdinand Fensky, deceased, and of the said Jeanette Fensky; and these defendants, and each of them, are further informed and believe, and they therefore allege, that at all times subsequent to the filing of said inventory and appraisement the complainants, and each of them, had actual knowledge of all of the facts and circumstances under which the said property was acquired by the said Jeanette Fensky, and of all the facts and circumstances connected with the acquisition of the same bearing upon or determinative of the question whether or not the property was in fact such community property, or that, failing such actual knowledge, they had notice of circumstances sufficient to put a reasonable man upon inquiry as to whether or not the said property was such community property, and that at all of said times they had the means of ascertaining whether or

not such property was in fact such community property. Admit that the said Jeanette Fensky inventoried but one promissory note for the sum of \$400.00, and admit that said inventory was duly signed by the said Jeanette Fensky as such administratrix. These defendants, and each of them, are informed and believe, and therefore allege, that said inventory was a true and correct inventory of all of the property belonging to the estate of the said Ferdinand Fensky. Allege that they, and each of them, are without knowledge respecting any of the other matters and things contained in paragraph IX of said bill of complaint.

10. Allege that they, and each of them, are without knowledge respecting any of the matters and things contained in paragraph X of said bill of complaint.

11. Allege that they, and each of them, are without knowledge respecting any of the matters and things contained in paragraph XI of said bill of complaint.

12. Admit that the complainant Louisa Pickens, on or about July 29, 1904, executed and delivered to the said Campbell for the said Jeanette Fensky a release or quitclaim releasing and conveying unto the said Jeanette Fensky all of the right, title and interest of the said Louisa Pickens in and to the property and estate of her said deceased brother; and admit that on or about August 3, 1904, the complainant Johanna Schutt executed and delivered to the said Campbell for the said Jeanette Fensky a similar release and quitclaim releasing and conveying unto the said Jeanette Fensky all of the right, title and interest of the said Johanna Schutt in and to the property, assets and

estate of her said deceased brother. Deny that in truth or in fact, as the said Jeanette Fensky or the said Campbell well or otherwise knew, or at all, the California real estate owned by said intestate, Ferdinand Fensky, was of the value of more than \$50,000.00, or of any value whatsoever in excess of \$6,200.00; and in this behalf these defendants, and each of them, allege that the said California real estate was by the said Jeanette Fensky, as administratrix aforesaid, duly inventoried in the said matter of the estate of Ferdinand Fensky, deceased, and was therein appraised at the aggregate sum of \$6,200.00, and that the whole of the estate mentioned in such inventory and appraisement was therein declared to be community property of the said Ferdinand Fensky and the said Jeanette Fensky; and allege that the said property, and the whole thereof, at the time of the death of said Ferdinand Fensky, did in fact constitute community property of the said Ferdinand Fensky and of the said Jeanette Fensky, and that no part thereof was the separate property of the said Ferdinand Fensky. Allege that they, and each of them, are without knowledge respecting any of the other matters and things contained in paragraph XII of said bill of complaint.

13. Allege that on the 5th day of November, 1903, the said superior court of the county of Los Angeles, state of California, duly gave and made its order and decree in the said proceeding therein entitled "In the Matter of the Estate of Ferdinand Fensky, deceased," wherein and whereby there was set apart unto the said Jeanette Fensky, the widow of the said decedent,



all of those certain lots or parcels of land described in paragraph III of said bill of complaint under the designation (B) as and for the homestead of her, the said Jeanette Fensky. That thereafter on the 30th day of March, 1905, the said Jeanette Fensky, as administratrix of the estate of the said Ferdinand Fensky, deceased, filed therein her final account as such administratrix in the said superior court. That thereafter such proceedings were taken and had by said superior court that on the 11th day of April, 1905, the said superior court duly gave and made its judgment and decree wherein and whereby the said superior court ordered, adjudged and decreed that said deceased left surviving as his only heirs at law his widow, Jeanette Fensky, his nephew, George Fensky, and the following brothers and sisters, to wit: Friedrich Fensky, Ida Wendt, Hulda Richter, Johanna Schutt, Louise Pickens, Augusta Krauss, and Charles Fensky, and that by reason of the said conveyances to the said widow, as set forth herein and in said petition for distribution all the residue of the property of said estate as thereafter in said decree described, and all other property belonging to said estate whether described therein or not, was distributed as follows: To Hulda Richter, sister of said deceased, one-sixteenth part thereof, and all the remainder to Jeanette Fensky, the widow of said deceased. That in said decree the real property described is the same as that described in said Exhibit 1 hereunto attached, excepting only that portion thereof theretofore set apart to said Jeanette Fensky as such probate homestead as

aforesaid; that thereafter on the 11th day of April, 1905, the said decree of said superior court was duly entered in book 115 of Minutes and Orders, at page 87; that thereafter the said Jeanette Fensky presented and filed in said superior court the receipts of the several distributees in said decree named for all of the property by said decree distributed to them, respectively, as aforesaid. Allege that the complainants, and each of them, had actual notice of the pendency in the said superior court of the said proceeding entitled "In the Matter of the Estate of Ferdinand Fensky, deceased" at all times after the institution of said proceeding, and that they, and each of them, had actual notice of the filing by the said Jeanette Fensky of her said final account and petition for distribution therein, and that they, and each of them, had actual notice of all of the matters and things appearing in and by the records in said proceeding, but that nevertheless neither of the complainants did then or at any time thereafter appear therein or object to any matter or thing in connection therewith. Deny that at the time of her death in 1908, the said Jeanette Fensky was the owner of the several parcels of real property described in paragraph XIII of said bill of complaint, or of any thereof. Allege that they, and each of them, are without knowledge respecting the other matters and things contained in paragraph XIII of said bill of complaint.

14. Admit that the said Jeanette Fensky died on July 8, 1908. Deny that prior to her death and on or about September 18, 1907, or at any other time, or at

all, the said Jeanette Fensky executed a deed conveying, or purporting to convey, to defendant Eugene Wellke, real estate situated in the state of Kansas. Deny that on or about May 28, 1907, or at any other time or at all, the said Jeanette Fensky signed a deed conveying, or purporting to convey, to the defendant Alma J. Schmidt the north 60 feet, or any other part, of the east 200 feet of lot 8 in Michner's Subdivision of the northeast 38.86 acres in block U. T. & B., Addition to Pasadena, California. Admit that some time prior to her death the said Jeanette Fensky made out and signed each of the other deeds mentioned in paragraph XIV of said bill of complaint, to wit, the deeds to the real property in said bill of complaint designated, respectively, as "Item 1", "Item 2", "Item 3", "Item 4", "Item 5", "Item 6", "Item 7", "Item 8", "Item 9", "Item 10", "Item 11" and "Item 12"; but deny that said deeds, or either or any of them, merely purported to convey the respective parcels of real property therein severally described. Deny that all or any, or either of said deeds so made out by the said Jeanette Fensky were not delivered to the respective grantees named therein until after the death of the said Jeanette Fensky; deny that the title or ownership of the said property did not pass to the said grantees, or that at the time of her death the said Jeanette Fensky was the owner of the same, or any thereof, and in this behalf these defendants allege that all of said deeds, so made out by the said Jeanette Fensky were by her delivered to the respective grantees named therein prior to the death of the said Jeanette Fensky and

that the title and ownership of the said property passed to the grantees named therein, respectively, and that at the time of her death the said Jeanette Fensky had no right, title, or interest therein or in any part thereof. Admit that the defendant J. H. Merriam wholly omitted said property from his inventory and account returned and filed in the estate of the said Jeanette Fensky, and admit that he paid over to each of the defendants Eugene Wellke, Amanda Katzung and Alma J. Schmidt \$235.61 out of the assets of her estate, and also turned over to them, the said defendants, certain notes belonging to the said Jeanette Fensky and certain property pursuant to the decree of distribution duly given and made in the said matter of the estate of Jeanette Fensky, deceased. Admit that the said Jeanette Fensky died on July 8, 1908, and that thereafter on or about August 1, 1908, on the petition of defendants Eugene Wellke, Amanda Katzung and Alma J. Schmidt, defendant J. H. Merriam was appointed by the superior court of Los Angeles County, California, administrator of the estate of said Jeanette Fensky, deceased; admit that in said petition it was alleged that the whole of the property of the said Jeanette Fensky at the time of her death consisted of about \$2,300.00 in money. Deny that for some, or any, time after his appointment, or ever or at all, defendant J. H. Merriam took no steps whatever looking to the administration of the said estate, and deny that on September 8, 1909, or at any other time, or at all, the said J. H. Merriam filed in said matter a pretended inventory, or any other or different inven-



tory than a true and correct inventory according to the best of his knowledge and belief. Allege that on said 8th day of September, 1909, the said J. H. Merriam, as such administrator, made and filed in said superior court in the matter of the said estate a true and correct inventory of all of the property and assets of said estate which had then come to his knowledge, a copy of which said inventory is hereunto annexed and marked Exhibit 2 and which is hereby referred to and made a part hereof. Allege that no other property or assets of said estate has at any time come to the knowledge of these defendants; that in and by said inventory it appears that the total assets of the estate of the said Jeanette Fensky amounted to the sum of \$3,509.38, consisting of \$2,324.38 of money, a claim against the defendant Amanda Katzung in the sum of \$135.00, and a note of the defendant Don Ferguson in the sum of \$1050.00. Deny that upon the coming in of said inventory or on September 8, 1909, the defendant J. H. Merriam filed a purported final account of said estate, or any final account thereof other than a true and correct one according to the best knowledge and belief of him, the said defendant J. H. Merriam. Admit that in said final account defendant J. H. Merriam represented that property of the intestate in course of administration in the probate court of Shawnee County, Kansas, had been wholly administered and distributed, and further represented that the said Jeanette Fensky left as her sole heirs at law the defendants Eugene Wellke, Amanda Katzung and Alma J. Schmidt. Deny that at the time the said final account

was filed defendant J. H. Merriam knew that the said Jeanette Fensky at the time of her death owned the real estate in paragraph XIII of said bill of complaint described, or any part thereof, and knew, or knew, that the same, or any part thereof, was distributable among the heirs at law of Ferdinand Fensky, the deceased husband of the said Jeanette Fensky, and knew, or knew, that neither the said Eugene Wellke, nor the said Amanda Katzung, nor the said Alma J. Schmidt had any interest whatsoever in the same, or in any part thereof. Deny that all or any of said deeds so made out by the said Jeanette Fensky were not delivered to the respective grantees named therein until after the death of the said Jeanette Fensky. Deny that the title and ownership, or title or ownership, of said property, or of any part thereof, did not pass to the said grantees, respectively, and at the time of her death, or at the time of her death, the said Jeanette Fensky was the owner of the same, or of any part thereof. Deny that the said J. H. Merriam well, or otherwise, or at all, knowing all or any of the matters and things in paragraph XIV of said bill of complaint alleged to be facts, pretended to make distribution of the estate of said Jeanette Fensky. Deny that the defendant Merriam pretended to act as administrator of the estate of said Jeanette Fensky. Deny that defendant Merriam had full, or any, knowledge of the alleged, or any, rights of the complainants herein, or of either of them. Deny that defendant Merriam had the purpose and design, or purpose or design, of preventing complainants, or either of them, from securing

their alleged just share, or any share, or the alleged share of either of them, of said estate of their deceased brother. Deny that defendant J. H. Merriam has made no effort to represent said estate or has failed, refused and neglected in any respect, or at all, to administer the same fully, or to perform any act by him required or proper to be performed as such administrator in or about the administration of the said estate, or pretends to deny the alleged rights of these complainants, or either of them, in respect thereof, or any of said alleged rights, or any rights whatever of said complainants, or either of them. Deny that defendant Merriam was at any time, or at all, employed by and acted as, or employed by, or acted as, attorney and agent, or attorney or agent for the defendants Eugene Wellke, Amanda Katzung, Minnie S. Farnsworth and Alma J. Schmidt, or either of these defendants, in any matter involving a conflict or controversy as between the interests of them, or either of them, and the interests of the estate of said Jeanette Fensky, deceased, or in any matter wherein the claims or interests of them, or either of them, were in conflict or inconsistent with the interests of said estate. Upon information and belief deny that he was employed by and acted as attorney and agent for, or was employed by, or acted as attorney or agent for the defendant Corrine Loveland, at any time or under any circumstances whatsoever, or at all. These defendants allege that they, and each of them, are without knowledge respecting any of the other matters and

things contained in paragraph XIV of said bill of complaint.

15. Admit that defendant Minnie S. Farnsworth is a daughter of defendant Eugene Wellke, and claims to be the owner of the property referred to in paragraph XV of said bill of complaint as described in "Item 3" thereof, but deny that such the claim of the said Minnie S. Farnsworth is by virtue of the alleged undelivered deed in said paragraph XV referred to, or by virtue of any undelivered deed whatever; allege that said defendant Minnie S. Farnsworth is the owner of the property referred to in said paragraph XV as described in "Item 3" thereof, to wit: "Lot 12 of A. F. Mills' Subdivision of the north half of lot 6 of the Berry and Elliott Tract, Pasadena, California"; deny that the right, title or interest which defendant Minnie S. Farnsworth has, or claims to have, in the said property last hereinbefore described, or any property of the estate of said Jeanette Fensky, is subject to the claims of said complainants, or either of them, as heirs at law, or an heir at law of the said Ferdinand Fensky, deceased, or of the said Jeanette Fensky, deceased. These defendants allege that they, and each of them, are without knowledge respecting the other matters and things contained in paragraph XV of said bill of complaint.

16. Admit that the complainants, and each of them, had knowledge of the contents of the inventories in paragraph XVI of said bill of complaint referred to, filed, respectively, by the said M. T. Campbell, the said Jeanette Fensky, and the said defendant Merriam.



Admit that these complainants, and each of them, through their children and otherwise, during the pendency of the proceedings in the probate court of Shawnee County, Kansas, in said bill of complaint alleged, and during the pendency of the said proceedings in the superior court of Los Angeles County, California, involving the administration of the estate of Ferdinand Fensky and of the estate of the said Jeanette Fensky, paid attention to said proceedings, and from time to time secured copies of said papers that were filed therein. These defendants allege that they, and each of them, are without knowledge respecting the other matters and things contained in said paragraph XVI of said bill of complaint.

## SECOND SEPARATE DEFENSE.

And for a second and separate answer to the complainants' bill of complaint, these defendants, jointly and severally, admit, allege and deny as follows:

1. These defendants hereby refer to each and every the admissions, allegations and denials contained in the first separate defense in this answer set forth, and by such reference incorporate the same in, and as part of, this second separate defense to said bill of complaint, to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

2. Allege that after the death of Jeanette Fensky, deceased, in July 1908, defendant Merriam was requested by her heirs, to wit, the defendants Eugene

Wellke, brother, and Alma J. Schmidt and Amanda Katzung, sisters of said Jeanette Fensky, deceased, to act as administrator with the will annexed of her estate, said brother and sisters being her surviving next of kin and all the heirs at law of said deceased; and they petitioned the said superior court in the said proceeding therein entitled "In the Matter of the Estate of Jeanette Fensky, deceased", and numbered "13286" on the register of said court, for the probate of the will of said deceased, and for the appointment of defendant Merriam as the administrator with the will annexed of that portion of her estate in California. That said superior court then was and now is a court of general jurisdiction, having jurisdiction of the estates of deceased persons.

3. Allege that defendant Merriam was by said court duly appointed as such administrator and qualified as such, and letters of administration with the will annexed were issued to him in said proceeding, and he proceeded to administer upon said estate, and performed all of his duties as such, including the return of an inventory in which was listed and described all the property in California belonging to said Jeanette Fensky, deceased, which had come to the knowledge or possession of defendant Merriam.

4. Allege that by the terms of said will all of the property in the state of Kansas belonging to said testatrix was devised and bequeathed to the nephews and nieces of Ferdinand Fensky, the deceased husband of said testatrix, share and share alike, and no testa-

mentary disposition was made of that portion of her estate situated in California.

5. Allege that after the expiration of the time within which claims against said estate could be filed, and the said estate being in a condition to be closed, defendant Merriam returned to said superior court in said proceeding his first and final account and report, as administrator with the will annexed of said estate of Jeanette Fensky, deceased, and his petition for distribution thereof, and after due notice given as required by law, and by the practice of said court, the said final account, report and petition for distribution came on regularly to be heard and was heard by said court, with evidence produced in support thereof, and the said court being fully advised in the premises gave and made its judgment and decree therein on the 22nd day of September, 1909, allowing and settling said final account and distributing to the defendants Eugene Wellke, Alma J. Schmidt and Amanda Katzung, as the heirs of said Jeanette Fensky, deceased, the balance of said estate then in the hands of defendant Merriam, as such administrator with the will annexed, and any other property belonging to said estate, as property not disposed of by said will. That thereafter, to wit, on the 22nd day of September, 1909, said judgment and decree was duly entered in book 145 of Minutes and Orders, at page 351; that no appeal has ever been taken therefrom, and that the same is, and for more than eight years last past has been, final and in full force and effect. That thereafter defendant Merriam distributed the said balance of the property

belonging to said estate in his hands to said distributees, and obtained their respective receipts for their distributive shares thereof, and has never since had in his possession, or under his control any money or property belonging to said estate. That thereafter, to wit, on the 13th day of October, 1909, defendant Merriam presented said receipts showing said distribution to have been made in accordance with said decree of distribution, and thereupon the said court duly and regularly gave and made its order in said administration proceeding discharging defendant Merriam, as such administrator, and the sureties upon his administrator's bond from further liability as such in that behalf, and thereafter defendant Merriam, under the law and probate practice of the state of California, had no further powers, rights, obligations or duties to exercise or perform in his capacity as such administrator with the will annexed of the estate of Jeanette Fensky, deceased, or in any other capacity or on behalf of said estate. That said order of discharge was thereafter, to-wit, on the 13th day of October, 1909, duly entered in book 7 of Orders and Decrees, at page 87, and that no appeal has ever been taken therefrom and that the same is, and for more than eight years last past has been final and in full force and effect.

6. That these defendants are informed and believe, and they therefore allege, that in all said matters and proceedings defendant Merriam acted in good faith and with an earnest purpose to perform faithfully and in all respects in conformity to the law in such case



made and provided each and every his duties and obligations as such administrator, and that he had no notice or knowledge of the existence of any of the alleged facts respecting the supposed existence of any property or estate of the said Jeanette Fensky, deceased, other than the property by him set forth in the said inventory by him filed in the matter of her said estate, and had no notice or knowledge respecting the alleged non-delivery by the said Jeanette Fensky, during her lifetime, of the deeds mentioned in paragraph XIV of said bill of complaint, nor of the alleged facts that the property described in the said several deeds, or any part thereof, belonged to, or constituted a part of, the property and estate of the said Jeanette Fensky, deceased, nor of the alleged facts that all of the property belonging to said Jeanette Fensky at the time of her death had come to her from her deceased husband, nor that it was his separate property, nor that his collateral heirs made any claim to it, nor to any part of it, and that defendant Merriam had no knowledge of any facts or circumstances that would put, or tend to put, him or any reasonable person upon inquiry respecting either, any or all of the alleged facts as to which it is hereinbefore in this paragraph averred that he had no notice or knowledge.

7. Allege that the complainants, and each of them, by having failed to assert in connection with the said administration proceedings in the state of California upon the estate of Jeanette Fensky, deceased, any claim that the property of said Ferdinand Fensky, deceased, was the separate property of the said Ferdi-

nand Fensky and was not community property of the said Ferdinand Fensky and the said Jeanette Fensky, or any claim to, or right, title or interest in the estate of said Jeanette Fensky, or any part thereof as heirs at law or otherwise, and by having permitted to be entered therein and to become final as aforesaid said judgment and decree of distribution wherein and whereby was determined as against all the world the persons who constituted the heirs at law of said Jeanette Fensky, and wherein and whereby there was distributed to the distributees in said decree named all of her estate within the state of California, and by having permitted said order of discharge of defendant Merriam, as administrator with the will annexed of the said estate of Jeanette Fensky, to be made and entered in said proceedings and to become final therein, are forever estopped from asserting or claiming as against these defendants, or any or either of them, that complainants, or either of them, are heirs at law of the said Jeanette Fensky, or entitled to have distributed to them, or either of them, any part whatsoever of the property of the estate of said Jeanette Fensky, deceased, or that they have any claim or demand whatsoever against these defendants, or either or any of them, by reason of the alleged matters and things set forth in their said bill of complaint, or otherwise or at all.

### THIRD SEPARATE DEFENSE.

And for a third and separate defense to said bill of complaint these defendants, jointly and severally, admit, allege and deny as follows:

1. These defendants hereby refer to each and all of the admissions, allegations and denials contained in the first separate defense in this answer set forth, and by such reference incorporate the same in, and as part of, this third separate defense to said bill of complaint to the same extent and with the same force and effect as though each and every the said admissions, allegations, and denials were here set forth at large.

2. These defendants hereby refer to each and every the admissions, allegations and denials contained in the second separate defense in this answer set forth, and by such reference incorporate the same in, and as part of, this third separate defense to said bill of complaint, to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

3. That at all of the times herein and in said bill of complaint mentioned these defendants, and each of them, have been citizens and residents of the state of California, and of the said Southern District thereof, and of the said Southern Division of said District, and that each of these defendants has, during the period comprehending all of said times, been actually present within said state, district and division for a total period of more than five years.

4. These defendants further allege that, by reason of the facts hereinbefore alleged, the complainants herein, and each of them, have been and are guilty of laches in the premises, and that any supposed cause of action against these defendants, or any, or either

of them, that the said complainants, or either of them, may at any time prior to the filing of said bill of complaint have had by reason of the alleged facts set forth in said bill of complaint, has become and is stale and barred by such the laches of said complainants, and of each of them, and does not entitle said complainants, or either of them, to any relief whatsoever in equity, or otherwise, against these defendants, or any or either of them.

#### FOURTH SEPARATE DEFENSE.

And for a fourth and separate defense to said bill of complaint these defendants, jointly and severally, admit, allege and deny as follows:

1. These defendants hereby refer to each and all of the admissions, allegations and denials contained in the first separate defense in this answer set forth, and by such reference incorporate the same in, and as part of, this fourth separate defense to said bill of complaint to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

2. These defendants hereby refer to each and every the admissions, allegations and denials contained in the second separate defense in this answer set forth, and by such reference incorporate the same in, and as part of, this fourth separate defense to said bill of complaint, to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.



3. That at all of the times herein and in said bill of complaint mentioned these defendants, each of them, have been citizens and residents of the state of California, and of the said Southern District thereof, and of the said Southern Division of said District, and that each of these defendants has, during the period comprehending all of said times, been actually present within said state, district and division for a total period of more than five years.

4. These defendants, and each of them, are informed and believe, and they and each of them therefore allege, that the complainants, and each of them, knew, or by the exercise of reasonable or any diligence could have known, all of the facts, and circumstances concerning the matters and things in said bill of complaint alleged to have occurred prior to the death of the said Ferdinand Fensky, deceased, and knew, or by the exercise of reasonable or any diligence could have known, at the several times at which the same occurred, all of the supposed facts and circumstances concerning the matters and things alleged in said bill of complaint to have taken place commencing with the death of the said Ferdinand Fensky down to and including the month of June, 1912, in connection with the administration of the estate of said Ferdinand Fensky, deceased, both in the state of California, and in the state of Kansas, during which period the complainants transferred and released to the said Jeanette Fensky their respective interests in the said estate of Ferdinand Fensky, deceased; and in particular that complainants, and each of them, knew, or by the exercise of reason-

able or any diligence could have known, prior to the said distribution of the estate of Jeanette Fensky, deceased, as aforesaid, all of the supposed facts and circumstances concerning the matters and things in their bill of complaint alleged to have taken place prior to the death of said Ferdinand Fensky, and after his death in connection with the respective administrations upon his said estate in the state of California and in the state of Kansas; that the complainants, and each of them, by having failed to assert in connection with the said administration proceedings in the state of California upon the estate of Jeanette Fensky, deceased, any claim that the property of Ferdinand Fensky was separate property of said Ferdinand Fensky and was not community property of said Ferdinand Fensky and said Jeanette Fensky, or any claim to or right, title or interest in said estate, or any part thereof as heirs at law, or otherwise, and by having permitted to be entered therein and to become final as aforesaid said judgment and decree of distribution, wherein and whereby was determined as against all the world the persons who constituted the heirs at law of said Jeanette Fensky, and wherein and whereby there was distributed to the distributees in said decree named all of her estate within the state of California, and by having permitted said order of discharge of defendant Merriam, as administrator with the will annexed of the said estate of Jeanette Fensky, to be made and entered in said proceedings and to become final therein, and by having failed to assert in connection with said administration proceedings in the state of Kansas upon

the estate of Ferdinand Fensky, deceased, in said bill of complaint alleged, any claim to, or right, title or interest in, said estate, or any part thereof, as heirs or otherwise, and by having permitted said judgment and decree of distribution to be entered by said probate court of Shawnee County, Kansas, and to become final therein, wherein and whereby was determined the persons who constituted the heirs at law of the said Ferdinand Fensky, deceased, and wherein and whereby there was distributed his estate in said state of Kansas to the distributees named in said decree last referred to, and by having permitted the said order of discharge of said M. T. Campbell, as administrator of the said estate of Ferdinand Fensky, deceased, within the state of Kansas to be made and entered in the administration proceedings last hereinbefore referred to and to become final therein, said complainants, and each of them, are now forever estopped from asserting or claiming, as against these defendants, or any or either of them, that complainants, or either of them, are heirs at law of the said Jeanette Fensky, or heirs at law of the said Ferdinand Fensky, or entitled to have distributed to them, or either of them, any part whatsoever of the property of the estate of Ferdinand Fensky, deceased, or any part of the property of the estate of Jeanette Fensky, deceased, or that they have any claim or demand whatsoever against these defendants, or either or any of them, by reason of the alleged matters or things set forth in their said bill of complaint, or otherwise, or at all.

## FIFTH SEPARATE DEFENSE.

And for a fifth and separate defense to said bill of complaint these defendants, jointly and severally, admit, allege and deny as follows:

1. These defendants hereby refer to each and all of the admissions, allegations and denials contained in the first separate defense in this answer set forth, and by such reference incorporate the same in, and as part of, this fifth separate defense to said bill of complaint to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

2. These defendants hereby refer to each and every the admissions, allegations and denials contained in the second separate defense in this answer set forth, and by such reference incorporate the same in, and as part of, this fifth separate defense to said bill of complaint, to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

3. That on the 28th day of September, 1909, defendant Minnie S. Farnsworth, as plaintiff, commenced an action in the superior court of the state of California, in and for the county of Los Angeles, against defendant Don Ferguson, as defendant, which said action was entitled "Minnie S. Farnsworth, plaintiff, vs. Don Ferguson, defendant" and numbered 70454 on the register of said court. That in and by the complaint filed in said action said defendant Minnie S. Farnsworth, as plaintiff therein, prayed for a judgment and decree of said court against defendant Don



Ferguson declaring and decreeing that title in and to the same real property in paragraph XIII of said bill of complaint herein designated as "Item 3", excepting, however, the north 15 feet thereof, was, at the time of the commencement of said action, and ever since the 10th day of July, 1908, had been, held by said defendant Don Ferguson in trust for the use and benefit of defendant herein Minnie S. Farnsworth, and praying further for an accounting between said defendant Don Ferguson and defendant herein Minnie S. Farnsworth for the rents, issues and profits of said property collected by said defendant Don Ferguson since the first day of October, 1908, and praying further that said defendant Don Ferguson be required to convey the legal title of said property to said plaintiff, and praying further for general relief. As ground for the relief by said defendant Farnsworth therein prayed against said defendant Ferguson, said complaint set forth that for a long time prior to July 9, 1908, defendant Ferguson was acting as the trustee, agent and business advisor of said Jeanette Fensky, and that during all of said time said defendant Ferguson was sustaining a fiduciary relation to said Jeanette Fensky in all matters pertaining to the purchase, management and sale of real estate. That on or about October 11, 1905, and as the trusted agent and advisor of said Jeanette Fensky, and for and on her behalf, and at her request, defendant Ferguson negotiated and contracted with one Charles W. Withereff for the purchase of that certain lot of land last hereinbefore referred to, and purchased the same, for

the price of \$16,000.00, all of which had been paid out of funds belonging to said Jeanette Fensky, that the said purchase was made for her and on her behalf and that said defendant Ferguson so represented it to said Jeanette Fensky, and in all subsequent transactions between the said defendant and the said Jeanette Fensky said property was represented, treated and considered as her property. That all times from its purchase down to the time of the death of said Jeanette Fensky, defendant Ferguson had charge thereof for her and collected the rents for her and accounted to her for the collection thereof. That defendant Ferguson, without the knowledge or consent of said Jeanette Fensky, caused the contract for the purchase of said lot of land to be made in his name as the buyer, and thereafter upon the payment therefor, as aforesaid, in accordance with the terms of said contract, had caused the deed therefor to be executed in the name of said defendant Ferguson, as grantee, instead of said Jeanette Fensky, and to be delivered to him, and that said deed was so made out and delivered and conveyed the title to said property to defendant Ferguson prior to April 30, 1906, and was by him on the day last named recorded in the office of the county recorder of said Los Angeles County. That on or about September 18, 1907 said Jeanette Fensky with the advice and assistance of said defendant Ferguson, made and executed to and in favor of defendant Minnie S. Farnsworth a deed purporting to convey the said property to said Minnie S. Farnsworth; that said deed was executed and acknowledged by said

Jeanette Fensky and was by her delivered to defendant Ferguson with instructions to hold the same in his possession until the death of said Jeanette Fensky and then to deliver the same to defendant Farnsworth. That said Jeanette Fensky died on or about July 9, 1908, and that on July 10, 1908, defendant Ferguson caused said last mentioned deed to be recorded in the office of the county recorder of said Los Angeles County, and said deed was therein recorded, and that thereafter for two months or more said defendant Ferguson accounted to defendant Farnsworth for the rents and income of said property. That thereafter about October, 1908, defendant Ferguson refused to account further to defendant Farnsworth for said rents and income and asserted that title to said property was in his name and that it belonged to him, and denied, and had ever since denied, that defendant Farnsworth was the owner of or entitled to the rents, issues and profits of said property. That from the time of the purchase of said property to and including the date of the deed to defendant Farnsworth, the said Jeanette Fensky was the equitable owner of said property and the title thereto was held in trust for her by defendant Ferguson, and that by virtue of said deed to defendant Farnsworth all the right, title and interest of said Jeanette Fensky in said property had passed to defendant Farnsworth, and defendant Farnsworth was at the time of filing said complaint, and had been since July 10, 1908, the equitable owner of said property and of every part thereof, and entitled to the rents, issues and profits thereof, and that defendant

Ferguson then held the legal title to said property in trust for defendant Farnsworth. Thereafter defendant Ferguson filed in said action his answer to the complaint of defendant Farnsworth therein, and also his cross-complaint against defendant Farnsworth therein. Thereafter the said defendant Farnsworth filed therein her answer to the said cross-complaint; and there after on March 16, 1910, the said cause came regularly on for trial before the said superior court, sitting without a jury, upon the pleadings hereinbefore mentioned and then on file in said action. Evidence was thereupon introduced on the part of defendant Farnsworth and also on the part of defendant Ferguson, and, the court having considered the evidence so introduced, the cause was thereupon continued for submission to March 18, 1910. On said date last mentioned, said cause again came on regularly for hearing, and the court having considered the evidence already introduced, and deeming it apparent that certain additional parties, to-wit, defendants Eugene Wellke, Alma J. Schmidt and Amanda Katzung might have some right, title or interest in or to the property described in said complaint and the other pleadings in said action, and deeming it important that they should be made parties to said action in order that there might be a complete and equitable determination of the issues therein, thereupon made and entered an order therein setting aside the previous order of submission and allowing the plaintiff to file a supplemental or amended complaint and to bring in said additional parties. Thereupon said action was con-



tinued to be called up subsequently upon the filing of additional pleadings and the joining of issues thereon. Thereafter on May 31, 1910, such supplemental or amended complaint was filed in which defendant Farnsworth and defendant Eugene Wellke joined as plaintiffs, and in which defendant Ferguson, defendant Alma J. Schmidt and defendant Amanda Katzung were named as defendants. That in and by said supplemental and amended complaint and the said answers thereto there were put in issue the title to, and the right to the possession of, each of the several items of real property in paragraph XIII of said bill of complaint described, and therein designated, respectively, as "Item 1", "Item 2", "Item 3", "Item 4", "Item 5", "Item 6", "Item 7", "Item 8", "Item 9", "Item 10", "Item 11", and "Item 12", and also all the right, title, claim and interest therein and thereto of the said parties to the said action, and of each of said parties. Thereafter each of said defendants therein named appeared and filed answers thereto. Thereafter the trial of said cause was regularly resumed on November 4, 1910, upon the issues raised by all the pleadings then on file therein, and evidence was thereupon introduced by and upon behalf of the respective parties; and thereafter the cause was ordered submitted and taken under advisement by said court. Thereafter on January 6, 1911, the said court ordered findings and judgment against defendant Ferguson; thereafter on October 24, 1911, the court made its findings and decision in writing and ordered judgment to be entered therein upon said findings and decision. Thereafter on De-

ember 27, 1911, the court gave and made its judgment therein upon its said findings wherein and whereby it was ordered, adjudged and decreed that defendant Farnsworth and defendants Schmidt and Katzung were the equitable owners in common of the said lot of land last hereinbefore referred to, and that the legal title thereof be, and the same was thereby, declared to be, vested in said equitable owners as tenants in common, and that said defendant Ferguson be, and he was thereby required to convey the said legal title to said equitable owners. Thereafter on January 4, 1912, said judgment was duly entered therein, and thereafter pursuant to notice in that behalf duly given on January 16, 1912, defendant Ferguson duly made a motion for a new trial in said action. Thereafter, on October 2, 1912, the said superior court duly gave and made its order granting such new trial therein. Thereafter said cause was set for trial for June 25, 1913. Thereafter on March 24, 1913, complainants herein filed in said action their complaint in intervention, and thereafter on May 17, 1913, said superior court gave and made its order allowing the complaint in intervention to be so filed as aforesaid.

Thereafter on October 27, 1913, the said complainants herein filed in said action their amended complaint in intervention; and thereafter on December 2, 1913, complainants herein filed in said action their second amended complaint in intervention; thereafter the defendants Farnsworth and Wellke demurred to said second amended complaint in intervention. Thereafter on April 29, 1914, said superior court duly gave

and made and entered its order in said action sustaining such demurrer to said second amended complaint in intervention with leave to amend within ten days. Thereafter written notice of the entry of said order having been served on the attorneys for said intervenors on the first day of May, 1914, and the time within which to file a third amended complaint in intervention having expired on May 11, 1914, and the complainants having, as such interveners, failed to amend their said second amended complaint in intervention within the time allowed by the court for that purpose, the said superior court on June 26, 1914, duly gave and made its judgment therein ordering, adjudging and decreeing that the said interveners, complainants herein, and each of them, take nothing by their second amended complaint in intervention, or by their original complaint in intervention, or otherwise, in the said action, and that defendants Farnsworth and Wellke do have and recover of and from said interveners, complainants herein, and each of them, their costs and disbursements incurred in defending the said original complaint in intervention and said second amended complaint in intervention. That said judgment last referred to was duly entered therein on July 2, 1914.

That thereafter such proceedings were therein taken and had that said superior court on January 18, 1916, duly gave and made its judgment in said action in favor of defendant Farnsworth and defendant Wellke herein, and against defendants Ferguson, Schmidt and Katzung herein, which said judgment was thereafter

on January 25, 1916, duly entered therein. That neither of said judgments therein entered, respectively, on July 2, 1914 and on January 25, 1916, has been modified, set aside or reversed, and that no appeal has ever been taken from either thereof, but that each of said judgments has become final and is in full force, virtue and effect, and binding upon the parties thereto.

That a copy of said second amended complaint in intervention is hereunto attached and marked Exhibit 3, and the same is hereby referred to and made a part hereof. That the causes of action in said second amended complaint in intervention alleged, and the matters thereby and thereunder litigated in said action, are identical in all substantial particulars with the alleged cause of action set forth in the bill of complaint herein and with the matters herein sought to be litigated by complainants, and that the issues by said bill of complaint tendered are identical in all substantial particulars with those raised by said second amended complaint in intervention and in and by said judgment determined as aforesaid, and that the said alleged cause of action set forth in said second amended complaint in intervention was for the same identical cause of action as set forth in the bill of complaint herein,—the same identical cause of action being pleaded in said bill of complaint as was pleaded in said second amended complaint in intervention and no other,—and that the parties to said second amended complaint in intervention are the identical parties who, with defendants Merriam and Loveland, constitute the parties to the suit at bar. That the said judgment



constitutes a prior adjudication against complainants, and each of them, of the alleged cause or causes of action and the whole thereof, and of all and singular the matters and things, set forth in said bill of complaint herein, and of each and every the claim and claims made by complainants, and each of them, in said bill of complaint; and that by reason of said judgment and of the facts hereinbefore in this fifth separate defense alleged, said complainants, and each of them, are forever estopped from setting up or asserting the said alleged cause or causes of action, and all and singular the matters and things set forth in said bill of complaint, and any and all claims and demands against these defendants, or either of them, arising upon, or by reason of, the said matters and things in said bill of complaint alleged.

#### SIXTH SEPARATE DEFENSE.

And for a sixth and separate defense to said bill of complaint these defendants, jointly and severally, admit, allege and deny as follows:

1. These defendants hereby refer to each and all of the admissions, allegations and denials contained in the first separate defense in this answer set forth, and by such reference incorporate the same in, and as part of, this sixth separate defense to said bill of complaint to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

2. These defendants hereby refer to each and every the admissions, allegations and denials contained in the

second separate defense in this answer set forth, and by such reference incorporate the same in, and as part of, this sixth separate defense to said bill of complaint, to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

3. That at all of the times herein and in said bill of complaint mentioned these defendants, and each of them, have been citizens and residents of the state of California, and of the said Southern District thereof, and of the said Southern Division of said District, and that each of these defendants, has, during the period comprehending all of said times, been actually present within said state, district and division for a total period of more than five years.

4. Allege that the defendant Farnsworth, by herself and by her predecessors in interest and title, for more than five years last preceding the filing of the bill of complaint herein, and at all times subsequent to said filing, has been, and now is, in the occupation and possession of the real estate in paragraph XIV of said bill of complaint described and referred to as "Item 3", and of the whole thereof, and of each and every lot and parcel of the same; that such her occupation and possession has at all times been continuous and uninterrupted and under claim of title, exclusive of other right, as her own, founding such claim upon the deed in said paragraph XIV alleged to have been by the said Jeanette Fensky executed, and, as therein alleged, purporting to convey all of the said real estate to defendant Farnsworth, and that such her occupation

and possession has been, at all of said times, actual, exclusive, open, notorious, peaceable and adverse to the complainants and to all the world and under claim of right, and that during all of said times defendant Farnsworth, and her predecessors in interest and title, have paid all taxes, state, county and municipal, which have been levied and assessed upon or against the said real estate, and upon the whole thereof, and upon each and every lot and parcel of the same. Allege that the complaints herein have not, nor has either of them, nor have their respective ancestors, predecessors, or grantors, been seized or possessed of said lots or parcels of land within five years before the filing of said bill of complaint; nor have they, or any or either of them, been seized or possessed of the said real estate, or of any lot or parcel of the same, or of any part thereof, within five years before the filing of the said bill of complaint. Allege that at the time the defendant Farnsworth came into the possession of the said real estate, to wit, more than five years prior to the filing of the bill of complaint herein, the same was of the value of \$16,000.00, or thereabouts; that the said real estate was then subject to a mortgage given to secure an indebtedness in the sum of \$9,000.00, and that there was then due and owing on account of such indebtedness the said sum of \$9,000.00; that at all times after defendant Farnsworth came into the possession of said real estate she paid out of her own moneys and funds all interest accruing on the said indebtedness and likewise out of her own moneys and funds paid for certain improvements thereon, and like-

wise paid certain assessments duly levied and assessed against the said real estate for local street improvements, and that the aggregate amount by said defendant Farnsworth so paid as aforesaid for taxes, interest, improvements and assessments exceeded any and all income by her derived from the said real estate by the sum of \$3,695.30 or thereabouts.

5. Allege that the defendant Schmidt, by herself and by her predecessors in interest and title, for more than five years last preceding the filing of the bill of complaint herein, and at all times subsequent to said filing, has been, and now is, in the occupation and possession of the real estate in paragraph XIV of said bill of complaint described and referred to as "Item 6", and of the whole thereof, and of each and every lot and parcel of the same; that such her occupation and possession has at all times been continuous and uninterrupted and under claim of title, exclusive of other right, as her own, founding such claim upon the deed in said paragraph XIV alleged to have been by the said Jeanette Fensky executed, and, as therein alleged, purporting to convey all of the said real estate to defendant Schmidt, and that such her occupation and possession has been, at all of said times, actual, exclusive, open, notorious, peaceable and adverse to the complainants and to all the world and under claim of right; and that during all of said times defendant Schmidt and her predecessors in interest and title, have paid all taxes, state, county and municipal, which have been levied and assessed upon or against the said real estate, and upon the whole thereof, and upon each



and every lot and parcel of the same. Allege that the complainants herein have not, nor has either of them, nor have their respective ancestors, predecessors, or grantors, been seized or possessed of said lots or parcels of land within five years before the filing of said bill of complaint; nor have they, or any or either of them, been seized or possessed of the said real estate, or of any lot or parcel of the same, or of any part thereof, within five years before the filing of the said bill of complaint. Allege that at the time the defendant Schmidt came into the possession of the said real estate, to wit, more than five years prior to the filing of the bill of complaint herein, the same was of the value of \$. . . . ., or thereabouts; that the said real estate was then subject to a mortgage given to secure an indebtedness in the sum of \$1,500.00, and that there was then due and owing on account of such indebtedness the said sum of \$1,500.00; that thereafter the said defendant Schmidt paid, out of her own moneys and funds, on account of the indebtedness secured by said mortgage to the owner and holder thereof the sum of \$300.00, and to that extent satisfied the said mortgage; that at all times after defendant Schmidt came into the possession of said real estate she paid out of her own moneys and funds all interest accruing on the said indebtedness, and likewise out of her own moneys and funds paid for certain improvements thereon, and that the aggregate amount by said defendant Schmidt so paid as aforesaid for taxes, interest, and improvements exceeded any and all

income by her derived from the said real estate by the sum of \$. . . . . or thereabouts.

6. Allege that the defendant Wellke, by himself and by his predecessors in interest and title, for more than five years last preceding the filing of the bill of complaint herein, and at all times subsequent to said filing, has been, and now is, in the occupation and possession of the real estate in paragraph XIV of said bill of complaint described and referred to as "Item 12", and of the whole thereof, and of each and every lot and parcel of the same; that such his occupation and possession has at all times been continuous and uninterrupted and under claim of title, exclusive of other right, as his own, founding such claim upon the deed in said paragraph XIV alleged to have been by the said Jeanette Fensky executed, and, as therein alleged, purporting to convey all of the said real estate to defendant Wellke, and that such his occupation and possession has been, at all of said times, actual, exclusive, open, notorious, peaceable and adverse to the complainants and to all the world and under claim of right; and that during all of said times defendant Wellke, and his said predecessors in interest and title, have paid all taxes, state, county and municipal, which have been levied and assessed upon or against the said real estate, and upon the whole thereof, and upon each and every lot and parcel of the same. Allege that the complainants herein have not, nor has either of them, nor have their ancestors, predecessors, or grantors, been seized or possessed of said lots or parcels of land within five years before the filing of said

bill of complaint; nor have they, or any or either of them, been seized or possessed of the said real estate, or of any lot or parcel of the same, or of any part thereof, within five years before the filing of the said bill of complaint. Allege that at the time the defendant Wellke came into the possession of the real estate, to wit, more than five years prior to the filing of the bill of complaint herein, the same was of the value of \$3,000.00, or thereabouts; that the said real estate was then subject to a mortgage given to secure an indebtedness in the sum of \$1,500.00, and that there was then due and owing on account of such indebtedness the said sum of \$1,500.00; that thereafter the said defendant Wellke wholly paid and discharged said indebtedness out of his own moneys and funds, and thereby procured said mortgage to be satisfied and released of record; that at all times after defendant Wellke came into the possession of said real estate he paid out of his own moneys and funds all interest accruing on the said indebtedness until the discharge thereof as aforesaid, and likewise out of his own moneys and funds paid for certain improvements thereon; and that the aggregate amount by said defendant Wellke so paid as aforesaid for taxes, interest, and improvements exceeded any and all income by him derived from the said real estate by the sum of \$. . . . . or thereabouts.

7. Allege that, by reason of the facts hereinbefore set forth, these defendants are, respectively, the owners, and in the possession, and entitled to the possession, of said several pieces of land of which they are

herein alleged to have been in the possession for the respective periods of time hereinabove mentioned, and that any and all supposed claims or demands of said complainants, and of each of them, against the said defendants, respectively, are wholly and forever barred.

#### SEVENTH SEPARATE DEFENSE.

And for a seventh and separate defense to said bill of complaint these defendants, jointly and severally, admit, allege and deny as follows:

1. These defendants hereby refer to each and all of the admissions, allegations and denials contained in the first separate defense in this answer set forth, and by such reference incorporate the same in, and as part of, this seventh separate defense to said bill of complaint to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

2. These defendants hereby refer to each and every the admissions, allegations and denials contained in the second separate defense in this answer set forth, and by such reference incorporate the same in, and as part of, this seventh separate defense to said bill of complaint, to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

3. These defendants hereby refer to each and every the admissions, allegations and denials contained in paragraphs 4, 5, and 6 of the sixth separate defense



in this answer set forth, and by such reference incorporate the same in, and as part of, this seventh separate defense to said bill of complaint, to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

4. Allege that after the making out and signing by the said Jeanette Fensky of the deed mentioned in paragraph XIV of said bill of complaint to the real property therein designated as "Item 1" and after the delivery thereof by said Jeanette Fensky to defendant Schmidt, as hereinbefore alleged, and immediately after the death of the said Jeanette Fensky, the defendant Schmidt entered into the occupation and possession of the said real property so designated as "Item 1" and remained in such occupation and possession of the whole thereof, and of each and every lot and parcel of the same, continuously until on or about June 24, 1911; that such her occupation and possession was at all times from and after her entering thereinto, as aforesaid, until on or about said June 24, 1911, continuous and uninterrupted and under claim of title exclusive of other right, as her own, founding such claim upon the said deed last mentioned, and that such her occupation and possession was, at all of said times, actual, exclusive, open, notorious, peaceable and adverse to the complainants and to all the world and under claim of right, and that during all of said times defendant Schmidt paid all taxes, state, county and municipal, which were levied and assessed upon or against the said real property and upon the whole

thereof, and upon each and every lot and parcel of the same. Allege that on or about said June 24, 1911, defendant Schmidt, for a good and valuable consideration by an instrument in writing by her duly executed, acknowledged and delivered to the grantee therein named, bargained, sold and conveyed the said real property, and the whole thereof, to one M. L. Beal, the said grantee, and immediately thereupon delivered the possession of the said real estate to the said Beal. These defendants are informed and believe, and they and each of them therefore allege, that at all times thereafter the said Beal, and his successors in interest, have been and they now are in the actual, continuous and uninterrupted occupation and possession of the said real estate, and of the whole thereof, and of each and every lot and parcel of the same. Allege that the complainants herein have not, nor has either of them, nor have their respective ancestors, predecessors or grantors been seized or possessed of the said real estate within five years before the filing of the said bill of complaint, nor have they, or any or either of them, been seized or possessed of the said real estate, or of any lot or parcel of the same, or of any part thereof, within five years before the filing of said bill of complaint. Allege that shortly after the delivery by defendant Schmidt to the said Beal of the said instrument as hereinbefore alleged, and long prior to the filing of the bill of complaint herein, the said instrument was placed of record in the office of the county recorder of said county of Los Angeles. These defendants are informed and believe, and they there-

fore allege, that at the time of the delivery of said instrument to the said Beal, and at the time of the payment of the consideration therefor by him to defendant Schmidt, the said Beal was wholly without knowledge respecting any of the supposed false and fraudulent matters, things and practices in said bill of complaint alleged, and that he accepted the delivery of said instrument and paid the said consideration, as aforesaid, in good faith.

5. Allege that after the making out and signing by the said Jeanette Fensky of the deed mentioned in paragraph XIV of said bill of complaint to the real property therein designated as "Item 2" and after the delivery thereof by said Jeanette Fensky to defendant Wellke, as hereinbefore alleged, and immediately after the death of the said Jeanette Fensky, the defendant Wellke entered into the occupation and possession of the said real property so designated as "Item 2" and remained in such occupation and possession of the whole thereof, and of each and every lot and parcel of the same, continuously until on or about December . . . ., 1908; that such his occupation and possession was at all times from and after his entering thereinto, as aforesaid, until on or about said December . . . , 1908, continuous and uninterrupted and under claim of title exclusive of other right, as his own, founding such claim upon the said deed last mentioned, and that such his occupation and possession was, at all of said times, actual, exclusive, open, notorious, peaceable and adverse to the complainants and to all the world and under claim of right, and that during all of said

times defendant Wellke paid all taxes, state, county and municipal, which were levied and assessed upon or against the said real property and upon the whole thereof, and upon each and every lot and parcel of the same. Allege that at the time the defendant Wellke came into the possession of the said real estate as aforesaid the same was of the value of \$3,000.00 or thereabouts; that the said real estate was then subject to a mortgage given to secure an indebtedness in the sum of \$1,300.00, and that there was then due and owing on account of such indebtedness the said sum of \$1,300.00. That during the time defendant Wellke was in the possession of said real estate, he paid, out of his own moneys and funds, all interest accruing on the said indebtedness (the aggregate amount of which is not now known to these defendants). Allege that on or about said December . . . ., 1908, defendant Wellke, for a good and valuable consideration by an instrument in writing by him duly executed, acknowledged and delivered to the grantee therein named, bargained, sold and conveyed the said real property, and the whole thereof, to one W. H. Warner, the said grantee, and immediately thereupon delivered the possession of the said real estate to the said Warner. These defendants are informed and believe, and they and each of them therefore allege, that at all times thereafter the said Warner, and his successors in interest, have been and they now are in the actual, continuous and uninterrupted occupation and possession of the said real estate, and of the whole thereof, and of each and every lot and parcel of the same.



Allege that the complainants herein have not, nor has either of them, nor have their respective ancestors, predecessors or grantors been seized or possessed of the said real estate within five years before the filing of the said bill of complaint, nor have they, or any or either of them, been seized or possessed of the said real estate, or of any lot or parcel of the same, or of any part thereof, within five years before the filing of said bill of complaint. Allege that shortly after the delivery by defendant Wellke to the said Warner of the said instrument as hereinbefore alleged, and long prior to the filing of the bill of complaint herein, the said instrument was placed of record in the office of the county recorder of said county of Los Angeles. These defendants are informed and believe, and they therefore allege, that at the time of the delivery of said instrument to the said Warner, and at the time of the payment of the consideration therefor by him to defendant Wellke, the said Warner was wholly without knowledge respecting any of the supposed false and fraudulent matters, things and practices in said bill of complaint alleged, and that he accepted the delivery of said instrument and paid the said consideration, as aforesaid, in good faith.

6. Allege that after the making out and signing by the said Jeanette Fensky of the deed mentioned in paragraph XIV of said bill of complaint to the real property therein designated as "Item 4" and after the delivery thereof by said Jeanette Fensky to defendant Wellke, as hereinbefore alleged, and immediately after the death of the said Jeanette Fensky, the defendant

Wellke entered into the occupation and possession of the said real property so designated as "Item 4" and remained in such occupation and possession of the whole thereof, and of each and every lot and parcel of the same, continuously until on or about November . . . ., 1908; that such his occupation and possession was at all times from and after his entering thereinto, as aforesaid, until on or about said November . . . ., 1908, continuous and uninterrupted and under claim of title exclusive of other right, as his own, founding such claim upon the said deed last mentioned, and that such his occupation and possession was, at all of said times, actual, exclusive, open, notorious, peaceable and adverse to the complainants and to all the world and under claim of right, and that during all of said times defendant Wellke paid all taxes, state, county and municipal, which were levied and assessed upon or against the said real property and upon the whole thereof, and upon each and every lot and parcel of the same. Allege that at the time the defendant Wellke came into the possession of the said real estate as aforesaid the same was of the value of \$2,000.00 or thereabouts; that the said real estate was then subject to a mortgage given to secure an indebtedness in the sum of \$1,000.00, and that there was then due and owing on account of such indebtedness the said sum of \$1,000.00. That at all times after defendant Wellke came into the possession of said real estate he expended, out of his own money and funds, the sum of \$185.00 in the payment of interest on the said indebtedness and in the payment of taxes levied and assessed

on said property, and in the payment of the expenses and commissions on making a sale of said property. Allege that on or about said November . . . ., 1908, defendant Wellke, for a good and valuable consideration by an instrument in writing by him duly executed, acknowledged and delivered to the grantee therein named, bargained, sold and conveyed the said real property, and the whole thereof, to one Charles White, the said grantee, and immediately thereupon delivered the possession of the said real estate to the said White. These defendants are informed and believe, and they and each of them therefore allege, that at all times thereafter the said White, and his successors in interest, have been and they now are in the actual, continuous and uninterrupted occupation and possession of the said real estate, and of the whole thereof, and of each and every lot and parcel of the same. Allege that the complainants herein have not, nor has either of them, nor have their respective ancestors, predecessors or grantors been seized or possessed of the said real estate within five years before the filing of the said bill of complaint, nor have they, or any or either of them, been seized or possessed of the said real estate, or of any lot or parcel of the same, or of any part thereof, within five years before the filing of said bill of complaint. Allege that shortly after the delivery by defendant Wellke to the said White of the said instrument as hereinbefore alleged, and long prior to the filing of the bill of complaint herein, the said instrument was placed of record in the office of the county recorder of said county of Los Angeles. These

defendants are informed and believe, and they therefore allege, that at the time of the delivery of said instrument to the said White, and at the time of the payment of the consideration therefor by him to defendant Wellke, the said White was wholly without knowledge respecting any of the supposed false and fraudulent matters, things and practices in said bill of complaint alleged, and that he accepted the delivery of said instrument and paid the said consideration, as aforesaid, in good faith.

7. Allege that after the making out and signing by the said Jeanette Fensky of the deed mentioned in paragraph XIV of said bill of complaint to the real property therein designated as "Item 9" and after the delivery thereof by said Jeanette Fensky to defendant Wellke, as hereinbefore alleged, and immediately after the death of the said Jeanette Fensky, the defendant Wellke entered into the occupation and possession of the said real property so designated as "Item 9" and remained in such occupation and possession of the whole thereof, and of each and every lot and parcel of the same, continuously until on or about July 1, 1909; that such his occupation and possession was at all times from and after his entering thereinto, as aforesaid, until on or about said July 1, 1909, continuous and uninterrupted and under claim of title exclusive of other right, as his own, founding such claim upon the said deed last mentioned, and that such his occupation and possession was, at all of said times, actual, exclusive, open, notorious, peaceable and adverse to the complainants and to all the world and under claim



of right, and that during all of said times defendant Wellke paid all taxes, state, county and municipal, which were levied and assessed upon or against the said real property and upon the whole thereof, and upon each and every lot and parcel of the same. Allege that at the time the defendant Wellke came into the possession of the said real estate as aforesaid the same was of the value of \$5,000.00 or thereabouts; that the said real estate was then subject to a mortgage given to secure an indebtedness in the sum of \$2,500.00, and that there was then due and owing on account of such indebtedness the said sum of \$2,500.00. That during the time defendant Wellke was in the possession of said real estate he paid, out of his own moneys and funds, all interest accruing on account of said indebtedness (the aggregate amount of which is not now known to these defendants). Allege that on or about said July 1, 1909, defendant Wellke, for a good and valuable consideration by an instrument in writing by him duly executed, acknowledged and delivered to the grantee therein named, bargained, sold and conveyed the said real property, and the whole thereof, to one Peter Orban, the said grantee, and immediately thereupon delivered the possession of the said real estate to the said Orban. These defendants are informed and believe, and they and each of them therefore allege, that at all times thereafter the said Orban, and his successors in interest, have been and they now are in the actual, continuous and uninterrupted occupation and possession of the said real estate, and of the whole thereof, and of each and every

lot and parcel of the same. Allege that the complainants herein have not, nor has either of them, nor have their respective ancestors, predecessors or grantors been seized or possessed of the said real estate within five years before the filing of the said bill of complaint, nor have they, or any or either of them, been seized or possessed of the said real estate, or of any lot or parcel of the same, or of any part thereof, within five years before the filing of said bill of complaint. Allege that shortly after the delivery by defendant Wellke to the said Orban of the said instrument as hereinbefore alleged, and long prior to the filing of the bill of complaint herein, the said instrument was placed of record in the office of the county recorder of said county of Los Angeles. These defendants are informed and believe, and they therefore allege, that at the time of the delivery of said instrument to the said Orban, and at the time of the payment of the consideration therefor by him to defendant Wellke, the said Orban was wholly without knowledge respecting any of the supposed false and fraudulent matters, things and practices in said bill of complaint alleged, and that he accepted the delivery of said instrument and paid the said consideration, as aforesaid, in good faith.

8. Allege that after the making out and signing by the said Jeanette Fensky of the deed mentioned in paragraph XIV of said bill of complaint to the real property therein designated as "Item 11" and after the delivery thereof by said Jeanette Fensky to defendant Wellke, as hereinbefore alleged, and immediately

after the death of the said Jeanette Fensky, the defendant Wellke entered into the occupation and possession of the said real property so designated as "Item 11" and remained in such occupation and possession of the whole thereof, and of each and every lot and parcel of the same, continuously until on or about April 1912; that such his occupation and possession was at all times from and after his entering thereinto, as aforesaid, until on or about said April . . . ., 1912, continuous and uninterrupted and under claim of title exclusive of other right, as his own, founding such claim upon the said deed last mentioned, and that such his occupation and possession was, at all of said times, actual, exclusive, open, notorious, peaceable and adverse to the complainants and to all the world and under claim of right, and that during all of said times defendant Wellke paid all taxes, state, county and municipal, which were levied and assessed upon or against the said real property and upon the whole thereof, and upon each and every lot and parcel of the same. Allege that at the time the defendant Wellke came into the possession of the said real estate as aforesaid the same was of the value of \$1,500.00 or thereabouts; that at all times after defendant Wellke came into the possession of said real estate he expended, out of his own moneys and funds, the sum of \$267.00 in improvements on said real estate. Allege that on or about said April . . . ., 1912, defendant Wellke, for a good and valuable consideration by an instrument in writing by him duly executed, acknowledged and delivered to the grantee therein named,

bargained, sold and conveyed the said real property, and the whole thereof, to one Marcus M. Moore, the said grantee, and immediately thereupon delivered the possession of the said real estate to the said Moore. These defendants are informed and believe, and they and each of them therefore allege, that at all times thereafter the said Moore, and his successors in interest, have been and they now are in the actual, continuous and uninterrupted occupation and possession of the said real estate, and of the whole thereof, and of each and every lot and parcel of the same. Allege that the complainants herein have not, nor has either of them, nor have their respective ancestors, predecessors or grantors been seized or possessed of the said real estate within five years before the filing of the said bill of complaint, nor have they, or any or either of them, been seized or possessed of the said real estate, or of any lot or parcel of the same, or of any part thereof, within five years before the filing of said bill of complaint. Allege that shortly after the delivery by defendant Wellke to the said Moore of the said instrument as hereinbefore alleged, and long prior to the filing of the bill of complaint herein, the said instrument was placed of record in the office of the county recorder of said county of Los Angeles. These defendants are informed and believe, and they therefore allege, that at the time of the delivery of said instrument to the said Moore, and at the time of the payment of the consideration therefor by him to defendant Wellke, the said Moore was wholly without knowledge respecting any of the supposed false and



fraudulent matters, things and practices in said bill of complaint alleged, and that he accepted the delivery of said instrument and paid the said consideration, as aforesaid, in good faith.

9. These defendants, and each of them, are informed and believe, and they and each of them therefore allege, that the complainants, and each of them, knew, or by the exercise of reasonable or any diligence could have known, all of the facts and circumstances concerning the supposed false and fraudulent matters, things and practices in said bill of complaint alleged, long prior to the laying out and expending by these defendants, respectively, of the said several sums of money by them hereinbefore alleged to have been laid out and expended, as aforesaid, and likewise long prior to the several transfers and conveyances hereinbefore alleged to have been made by these defendants, respectively; but that nevertheless complainants, and each of them, stood by and permitted said several sums to be by these defendants, respectively, laid out and expended as aforesaid, and likewise stood by and permitted defendants Alma J. Schmidt and Eugene Wellke, respectively, to make the several transfers and conveyances hereinbefore by them alleged to have been made, as aforesaid, without objection by complainants, or either of them, to the making of any of said expenditures or of any of said conveyances, and without asserting any right, title or interest whatsoever in or to the several parcels of real property which were so conveyed as aforesaid or upon which expenditures were so made as aforesaid.

10. Allege that of the said sums by these defendants, respectively, hereinbefore alleged to have been expended in connection with the several parcels of real property in this seventh defense referred to, a large portion thereof (the exact amount of which is not at this time known to these defendants, or either of them) was by these defendants, respectively, laid out and expended subsequent to the time of the alleged discovery by complainants of the supposed false and fraudulent matters, things and practices in said bill of complaint alleged, and prior to the filing of said bill of complaint.

11. Allege that the complainants have not paid or offered to pay to these defendants, or either of them, any of the said sums by them in this seventh separate defense alleged to have been expended, respectively, on, or in connection with, the several parcels of land in this seventh defense referred to, or any part thereof; and that by reason of the matters and things in this seventh defense alleged it appears that complainants, and each of them, have wholly failed to do equity herein with respect to these defendants.

WHEREFORE, these defendants, and each of them, having thus made full answer to all the matters and things contained in said bill of complaint, pray to be dismissed hence with their costs in this behalf incurred.

J. H. Merriam,  
Solicitor for defendants Eugene  
Wellke, Alma J. Schmidt and  
Minnie S. Farnsworth.

County of Los Angeles, )

Eugene Welke,

Subscribed and sworn to before me  
this 11th day of February, 1918.

(Seal) Notary Public in and for the county  
of Los Angeles, state of California.

IN THE SUPERIOR COURT OF THE STATE  
OF CALIFORNIA, IN AND FOR THE COUNTY  
OF LOS ANGELES.

SECOND AMENDED COMPLAINT IN  
INTERVENTION.

The intervenors herein, Louise Pickens and Johanna Schutt, by leave of the court first had and obtained,

file this their second amended complaint in intervention, and allege as follows:

I.

That the said intervenors are the sisters of Ferdinand Fensky, who dies intestate at San Pedro, Los Angeles, County, California, on the 7th day of August, 1903; that at the time of his death the said Ferdinand Fensky left surviving him his wife Jeanette Fensky, and besides these intervenors, the following brothers and sisters:

Frederick Fensky, residing at Leavenworth, Kansas;

Ida Wendt, residing at Kulmsee, Germany;

Huldah Richter, residing at Berkeley, California;

Augusta Kraus, residing at Topeka, Kansas;

Charles Fensky, residing at Pueblo, Colorado; and also, George Fensky, son of Herman Fensky, deceased, brother of the said Ferdinand Fensky, residing at Topeka, Kansas;

That the said Ferdinand Fensky and Jeanette Fensky had no children;

II.

That at the time of his death the said Ferdinand Fensky was the owner of the following real estate situated in the State of California, to wit:

(a) A piece of property on New High Street, in the city of Los Angeles, county of Los Angeles, state of California, described as follows: Commencing at a point on the west line of New High street, distant 200 feet southwest from the southwest corner of Alpine street and New High street; thence southwesterly along the west line of New High street 73 feet to a



point; thence westerly and at right angles to said west line of said New High street 65 feet to a point; thence northeasterly and at right angles to said last mentioned course and distant and parallel with the west line of New High street 73 feet to a point; and, thence easterly by a straight line 65 feet to the west line of New High street to a point of beginning or commencement, being parts of Lot 10 and 11, in Block 33 of Ord's Survey, according to the map in Book 53, page 66, Miscellaneous records of Los Angeles county;

(b) Lots 9 and 10 of Peck's sub-division of Block 74 in the city of San Pedro, county of Los Angeles, state of California;

(c) The west half of the southwest quarter of the northwest quarter of section 24, township 5, range 10, in Orange county, state of California;

(d) The southwest quarter of the southeast quarter and the southhalf of the northwest quarter of the southwest quarter of section 4, township 5, range 10, in Orange county, state of California;

(e) Lots 19 to 29, inclusive, in Block C, Peck's sub-division of Blocks A, B and C, of the Carolina Tract, in San Pedro, California;

### III.

That in addition to the real estate described in Paragraph II, the said Ferdinand Fensky was the owner, at the time of his death, of personal property, consisting *or* promissory notes payable to him, amounting in all to the sum of about \$14,465.00, and also of certain contracts of sale of real estate situated in the County of Shawnee, state of Kansas, which said con-

tracts were made in the lifetime of the said Ferdinand Fensky, the same being made with the following persons: George Brosamer, M. G. Tracy, Camille Vanlaeys, B. H. Stamin, Benjamin Dustin, George Lippert, W. L. Havens, George Walker, Reed Sawyer, Henry Frank, John Dietz, Mike Etzel (Casper Getty, assignee), Maurice Sawyer (Wesley Sager, assignee), Louis Schaeffler, Frank Sawyer, Frank Gutch, John Sell, Jacob Fink, George Jammer, Molly Grant, John Domme, Geo. Baxter, J. D. Gibbon, George Hamrick;

That the exact amount due on said contracts respectively at the time of the death of the said Ferdinand Fensky is not within the knowledge of the said intervenors, except in a general way, but on information and belief, said intervenors aver that the amount due on said contracts exceeded the sum of \$20,000.00, exclusive of interest; and said intervenors further allege, on information and belief, that there were other contracts, or similar contracts, for the sale of real estate situated in said County of Shawnee, state of Kansas, in addition to those hereinabove mentioned, executed by the said Ferdinand Fensky in his lifetime, but which said intervenors, at this time, are unable to describe, for want of information;

That these intervenors are informed and believe, and therefore allege that said Jeanette Fensky collected all the money due and to grow due and owing under said contracts and promissory notes, both principal and interest, and that in all she collected and received from said notes and contracts and from other sources, more than the sum of forty thousand

(\$40,000.00) Dollars, the exact amount of which is unknown to these intervenors;

IV.

That at the time of the death of the said Ferdinand Fensky, the laws of the State of Kansas, as construed by its Supreme Court, provided that all the beneficial ownership in and to real estate passed from the vendor to the vendee in a contract for the sale of real estate upon a valuable consideration, and that by such laws, immediately upon the execution and delivery of said contract of sale, by operation of law, the character of the property was changed, and the real estate described in said contracts ceased to be the real property of the vendor, and he held the legal title merely as security for the payment of the purchase price thereof; That by reason of the said laws, upon the death of the said Ferdinand Fensky, the real estate described in said contracts of sale, did not descend to his heirs at law, but said contracts of sale, as personal property, descended to his personal representative, and as such became distributable according to the law of the place of his decease; that all of said contracts of sale were the separate property of the said Ferdinand Fensky at the time of his death;

V.

That certain proceedings were taken in the Probate Court of Shawnee County, Kansas, by one M. T. Campbell, of Topeka, Shawnee County, Kansas, by which he became the administrator of the Estate of the said Ferdinand Fensky, deceased; That with full knowledge of the fact that the said Ferdinand Fensky,

at the time of his death, owned the personal property hereinbefore described in Paragraph III, to wit, the contracts of sale of real property, the said M. T. Campbell, as such administrator, failed and neglected to inventory the same as a part of the Estate of the said Ferdinand Fensky; and in so doing acted pursuant to an agreement between himself and the said Jeanette Fensky, surviving widow of the said Ferdinand Fensky, deceased, and with the consent of the said Jeanette Fensky, the said M. T. Campbell concealed from said intervenors, and from the other heirs of the Estate of the said Ferdinand Fensky, the fact that said contracts belonged to the said Ferdinand Fensky at the time of his death, and were a part of his said estate; that the said Jeanette Fensky acted and connived with the said M. T. Campbell, and for the purpose of concealing from the heirs at law of the said Ferdinand Fensky, including these intervenors, the ownership of the said contracts, wrongfully pretended and represented to these intervenors, and to the other heirs of the said Estate of the said Ferdinand Fensky, that she owned the said real estate, and from time to time executed and delivered through the instrumentality of the said M. T. Campbell to the vendees named in said contracts, deeds conveying the said real estate, and took from said vendees mortgages in her own name, and thereby secured and kept from said estate and from said intervenors and from the other heirs at law of the Estate of the said Ferdinand Fensky, deceased, the said property hereinabove described;



## VI.

That after the death of the said Ferdinand Fensky, the said Jeanette Fensky was appointed administratrix of his estate in the County of Los Angeles and State of California, and proceeded to administer the same; that the said Jeanette Fensky procured the said real estate situated in the said State of California to be appraised at the sum of sixty-seven hundred (\$6700.00) Dollars; That these intervenors are informed and believe, and therefore allege that the said property was of the value at said time of the sum of Thirty thousand (\$30,000.00) Dollars.

## VII.

That for the purpose of deceiving and defrauding these intervenors and the other heirs of the Estate of Ferdinand Fensky, and with the intent so to do, the said Jeanette Fensky and the said M. T. Campbell concealed the fact that the contracts for the sale of said real estate in the County of Shawnee, State of Kansas, belonged to the Estate of the said Ferdinand Fensky, and failed and neglected to insert the said contracts, or any money received therefrom, in the inventory returned to the said Probate Court of the said County of Shawnee, state of Kansas, and procured said Estate of Ferdinand Fensky physically situate in the State of California to be appraised for the sum of \$6700.00, but in truth and in fact the said real estate was of the value of more than \$30,000.00, as these intervenors are informed and believe, and therefore allege; that said representations and concealments above set out were made by the said Jeanette Fensky

and the said M. T. Campbell to these intervenors for the purpose of cheating and defrauding them, and for the purpose of inducing them to release and quitclaim unto the said Jeanette Fensky all of their right, title and interest in and to the Estate of the said Ferdinand Fensky, as heirs thereof, and the said intervenors believed the representations made by the said M. T. Campbell and the said Jeanette Fensky as to the character and value of the Estate of said Ferdinand Fensky, as hereinbefore alleged, and relied upon the same, and neither of said intervenors had any knowledge at said time that the said contracts of sale were the property of the said estate of Ferdinand Fensky, and neither of said intervenors had at said time any means of obtaining any knowledge or information as to the real facts in regard to the said estate and as to the value thereof, and by reason of their belief and reliance upon said representations of said M. T. Campbell and said Jeanette Fensky as to the character and value of the said Estate of Ferdinand Fensky, said intervenors were induced to release and quitclaim unto the said Jeanette Fensky and did release and quitclaim unto said Jeanette Fensky all their right, title and interest in and to the Estate of said Ferdinand Fensky situate in the said County of Shawnee, State of Kansas, and all of their right, title and interest in and to the Estate of said Ferdinand Fensky situate in the County of Los Angeles, State of California, for the sum of one thousand (\$1000.00) Dollars; that had the said intervenors, or either of them, known the true value and character of the said prop-

erty belonging to the said Estate of Ferdinand Fensky they would not have so released and quitclaimed their interest therein to said Jeanette Fensky, but would have required the distribution of their respective shares in said estate to them, as provided by law; That these intervenors are informed and believe, and therefore allege, that each of them would have been entitled to receive from the Estate of Ferdinand Fensky, as heirs thereof, an amount greater than the sum of one thousand (\$1000.00) dollars, and that by reason of the fraud and deceit practiced upon them by the said M. T. Campbell and the said Jeanette Fensky each of the said intervenors have been damaged, the exact amount of which damage is unknown to these intervenors at this time;

#### VIII.

That the said Jeanette Fensky paid to each of said intervenors, from the proceeds of the estate of the said Ferdinand Fensky, the said sum of one thousand dollars, and in exchange for said sum so paid to them, each of said intervenors executed to the said Jeanette Fensky a release and quitclaim of all their right, title and interest in and to and about and concerning the said Estate of the said Ferdinand Fensky, deceased; That such releases and quitclaim deeds were obtained from the said intervenors by the misrepresentation, fraud and concealment practiced upon them by the said M. T. Campbell and the said Jeanette Fensky, as hereinabove alleged, and that at the said time the said intervenors, and each of them, were in complete ignorance of their rights in respect to said contracts

of sale, and of the value of the said Estate of the said Ferdinand Fensky, both in the County of Shawnee, state of Kansas, and in the county of Los Angeles, state of California; and that the intervenors first learned of the fraud practiced upon them and of the real facts concerning the said Estate of the said Ferdinand Fensky, and of the character and value of the property belonging thereto during the month of July, 1912, and that neither of said intervenors had any knowledge concerning the same prior to said time;

IX.

That after procuring said deeds of release and quit-claim from the said intervenors, the said Jeanette Fensky pretended to act as said administrator and represented said deeds of release and quit-claim to intending purchasers as valid and sufficient to convey to her all the right, title and interest of the said heirs at law of the said Ferdinand Fensky, and by means thereof claimed exclusive ownership of all the assets of the said Estate of the said Ferdinand Fensky, and disposed of the same for a large amount of money, which she used in the purchase of personal property and real estate; That the said Jeanette Fensky died in 1909, and at the time of her death all of the property owned by her was derived from the estate of her deceased husband, Ferdinand Fensky; and that the said Jeanette Fensky owned no property except that acquired by her from the estate of her said deceased husband; that prior to her death the said Jeanette Fensky signed deeds to all of the real property standing in her name on the records of Los Angeles County,



state of California, at the time of her death, said property being described as follows:

(1)

Deed to Alma J. Schmidt of the north 66 feet of the east 200 feet of lot 80, L. H. Michner's Subdivision of the north 38 acres in Block "U" of Painter & Ball's addition to Pasadena. Note. This deed is dated September 18, 1907, recorded 2:00 P. M., July 10, 1908, B. 3410, p. 229.

(2)

Deed to Eugene Wellker of lot 6 in block "A", New Fair Oaks Avenue Tract, Pasadena, Cal. Note. This deed is dated September 18, 1907, recorded 2:54 P. M., July 10, 1908, B. 3410, p. 230.

(3)

Deed to Minnie S. Farnsworth of lot 12 of A. J. Mill's Subdivision of the north half of lot 6 of the Berry & Elliott Tract, Pasadena, Cal. Note. This deed is dated September 18, 1907, recorded 2:37 P. M., July 10, 1908, B. 3430, P. 142.

That the last described property is the same property described in the original complaint herein, the conveyance of which to defendant Don Ferguson is sought to be set aside in the original complaint in this action.

(4)

Deed to Eugene Wellke of that portion of lot "O" of the San Pasqual Tract in Pasadena, Cal., described as follows: Beginning at a point in the east line of lot four distant one hundred thirty two feet south from the northeast corner thereof; thence west parallel with the north line of said lot two hundred feet to

the east line of Magnolia Avenue one hundred feet; thence east parallel with the north line of said lot two hundred feet to the east line thereof; thence along the last mentioned line one hundred feet to the place of beginning. Note: This deed is dated September 18, 1907, recorded 2:38 P. M., July 10, 1908, B. 3430, pp. 142-143.

## (5)

Deed to Amanda Katzung of lot 2 of the F. E. Crawford Tract, in Pasadena, Cal.

Note: This deed is dated September 18, 1907, recorded 2:39 P. M., July 10, 1908, B. 3430, p. 143.

## (6)

Deed to Alma J. Schmidt of lot 16 of S. H. Doolittle's Subdivision of lot 21 of B. F. Ball's Subdivision in Pasadena, Cal. Note: This deed is dated September 18, 1907, recorded 2:40 P. M., July 10, 1908, B. 3420, p. 144.

## (7)

Deed to Amanda Katzung of lot 10 Peck's Subdivision of Block 74 in San Pedro, Cal.

Note: This deed is dated September 18, 1907, recorded 2:41 P. M., July 10, 1908, B. 3430, p. 145.

The property conveyed by this deed was part of Ferdinand Fensky's estate.

## (8)

Deed to Amanda Katzung conveys the tract on New High street in Los Angeles, Cal., hereinbefore described in Paragraph II, Subdivision (a).

Note: This deed is dated September 18, 1907, recorded 2:42 P. M., July 10, 1908, B. 3430, p. 146.

The property conveyed is a part of the real estate owned by Ferdinand Fensky.

(9)

Deed to Eugene Wellke of the portion of lot 21 of A. F. Mill's subdivision of the north half of lot 6 of the Berry & Elliot Tract in Pasadena, Cal., beginning at the northwest corner of said lot; thence east along the south side of Colorado Street twenty-five feet; thence south one hundred thirty-two and seventy-five hundredths feet to an alley; thence west twenty-five feet; thence north one hundred thirty-two and seventy-five hundredths feet to the place of beginning, except a strip twelve and seventy-five hundredths feet wide off the north side, now a part of Colorado street.

Note: This deed is dated September 18, 1907, recorded at 2:45 P. M., July 10, 1908, B. 3430, p. 147.

(10)

Deed to Corrine Loveland of the south fifty feet of the north one hundred feet of lot eight and the south fifty feet of the north one hundred feet of the west ten feet of lot 7 of L. A. Michner's Subdivision of lots 14 to 17 of the Summit Avenue Tract in Pasadena, Cal.

Note: This deed is dated August 28, 1906, recorded 2:36 P. M., July 10, 1908, B. 3408, p. 268.

(11)

Deed to Eugene Wellke of lot 24 of Mary H. Newton Tract in Pasadena, Cal.

Note: This deed is dated September 18, 1907, recorded 2:46 P. M., July 10, 1908, B. 3427, P. 139.

(12)

Deed to Eugene Wellke of lot 7 in Block "A" of G. Weingarth's Subdivision "B" of the San Gabriel Orange Association lands in Pasadena, Cal.

Note: This deed is dated September 18, 1907, recorded 2:47 P. M., K July 10, 1908, B. 3427, P. 139.

That the said deeds were by the said Jeanette Fensky kept in her possession, and were not delivered during her lifetime;

That after the death of the said Jeanette Fensky the said deeds were delivered to the respective grantees therein, but by reason of the same not being delivered to them during the lifetime of the said Jeanette Fensky the title to the said property did not pass to the said grantees, and at the time of her death the said Jeanette Fensky was the owner of the said property.

X.

That the said intervenors have never received any portion of their distributive shares of the estate of Ferdinand Fensky, or any portion of the same, except the sum of one thousand dollars paid to them by the said Jeanette Fensky for the release and quit claim deeds to their interest in said estate, as hereinbefore set out; and that the said Jeanette Fensky held the distributive shares of the said intervenors in said Estate of Ferdinand Fensky, deceased, which came into her hands, and all the profits, increase and proceeds arising therefrom, in trust for the said intervenors;

These intervenors are informed and believe, and therefore allege that all the property owned by the



said Ferdinand Fensky at the time of his death was his separate property.

# XI.

That one of the sisters of Ferdinand Fensky surviving his death was Ida Wendt, who, at the time of the death of the said Ferdinand Fensky, lived in Germany; That afterwards the said Ida Wendt died, leaving as her sole heir at law Conrad Wendt, who also died intestate, without issue, and without direct heirs at law in Germany; That as sisters of the said Ida Wendt, deceased, and maternal aunts of the said Conrad Wendt, deceased, said intervenors inherited one-seventh of the interest of the said Ida Wendt in the Estate of the said Ferdinand Fensky, and that by virtue of such inheritable interest said intervenors and each of them are entitled to an additional one-seventh of one-sixteenth of the Estate of the said Ferdinand Fensky, distributable, to the said Ida Wendt, and, therefore, to her heirs at law.

WHEREFORE, intervenors pray judgment, etc.

As a second and separate cause of action, said intervenors allege:

# I.

Intervenors re-allege and re-affirm all of intervenors' first cause of action herein, and by reference thereto makes it a part of this second cause of action, the same as if it were re-pleaded and re-alleged herein at length;

# II.

That the said Jeanette Fensky died in the county of Los Angeles, state of California, in July, 1908;

That at the time of her death she was the widow of Ferdinand Fensky; That she left no issue, and that at the time of her death she was the owner of the real property described in Paragraph IX of intervenor's first cause of action, hereinbefore set out; That all said property and all the property owned at said time by the said Jeanette Fensky was derived from the estate of her deceased husband, Ferdinand Fensky, by descent, as set out in intervenors' first cause of action; That the said Jeanette Fensky left a last will and testament, by the terms of which she undertook to dispose of certain personal property to the nephews and nieces of her said husband, Ferdinand Fensky, deceased, but did not attempt to dispose of any of the property owned by her situate in the state of California, including the said property described in Paragraph IX of intervenors' first cause of action; That after the death of the said Jeanette Fensky an administrator was appointed, with will annexed, of the estate of the said Jeanette Fensky, but the inventory returned by said administrator did not contain any description or mention of the property of the said Jeanette Fensky situate in the state of California, including the property described in Paragraph IX of intervenors' first cause of action;

That afterward such proceedings were had that on the 13th day of October, 1909, the said administrator reported to the said court, sitting as a Probate Court, that the Estate of said Jeanette Fensky was entirely disposed of and closed, and asked for and obtained a final order from said court, of distribution and settle-

ment; That neither of these intervenors received any portion of the said property from the distribution of the said Estate of Jeanette Fensky;

III.

That prior to her death the said Jeanette Fensky signed deeds to the real property owned by her at the time of her death, to the various people as particularly set out and described in Paragraph IX of said intervenors' first cause of action, but the said Jeanette Fensky did not deliver said deeds to the said grantees, but kept the same in her possession or under her control until her death, and at the time of her death she was the owner of said property; That these intervenors, by reason of their relationship to the said Ferdinand Fensky, deceased, are heirs at law of the said Jeanette Fensky, and as such are entitled to their distributive shares of the said estate of Jeanette Fensky, deceased;

WHEREFORE, intervenors pray:

FIRST: That they may be permitted to intervene in this action, setting up their rights as against the said Jeanette Fensky, and against Minnie S. Farnsworth, Eugene Wellke, Don Ferguson, Amanda Katzung and Alma Schmidt, parties to this action, and against the heirs and representatives of the said Jeanette Fensky;

SECOND: That an account be taken and stated of the property of the said Ferdinand Fensky which came into the hands of the said Jeanette Fensky, as administratrix of the estate of her deceased husband, Ferdinand Fensky, or otherwise, and that an account

be taken of the manner in which the proceeds of the estate of the said Ferdinand Fensky were converted and invested;

THIRD: That the said deeds of release and quit claim executed by the said intervenors, and each of them, be adjudged to be wholly void and fraudulent, and of no binding force and effect upon said intervenors;

FOURTH: That an account be taken and stated by this court of all the property owned by the said Jeanette Fensky in her lifetime, and of the property owned by her at the time of her death; That said parties to this action, to wit, Minnie S. Farnsworth, Eugene Wellke, Don Ferguson, Amanda Katzung and Alma Schmidt, be required to account for any and all the property held by, deeded to or received by them and belonging to the said Jeanette Fensky at the time of her death, and that these intervenors be permitted to account to the Estate of the said Ferdinand Fensky for the said sum of one thousand dollars each received by them from the said Jeanette Fensky, as set out in this complaint in intervention;

FIFTH: That the pretended final settlement made in the estate of the said Jeanette Fensky be set aside, and that the said estate be re-opened, and that all the assets and all the property of every description found by this court to be owned by the said Jeanette Fensky at the time of her death be declared to be a part of the assets of the said estate;

SIXTH: That these intervenors be adjudged to be heirs at law of the said Ferdinand Fensky and of the



said Jeanette Fensky; and that they be decreed to be entitled to their distributive shares of the said estate of Ferdinand Fensky and of the estate of the said Jeanette Fensky, as provided by law;

SEVENTH: That said intervenors have judgment for costs incurred herein, and for such other and further relief as to this Honorable Court may seem just and equitable.

EDWIN D. McKEENER,

D. R. HITE

DAVIS, KEMP & POST.

Attorneys for said intervenors.

County of Los Angeles.        )  
STATE OF CALIFORNIA,        ) ss.

C. A. POST being duly sworn, deposes and says: That he is one of the attorneys for the intervenors named in the foregoing Second Amended Complaint in Intervention in the foregoing and above entitled action; that he has read the foregoing Second Amended Complaint in Intervention and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and that as to those matters he believes it to be true.

C. A. POST

Subscribed and sworn to before me this  
2d day of December, 1913.

E. C. MEAD

Notary Public in and for the  
county of Los Angeles, state of  
California.

(SEAL)

[Exhibits 1 and 2, annexed to the foregoing amended answer, are omitted by stipulation, the same being printed in the Condensed Statement of the Evidence as Plaintiffs' Exhibits 18 and 21 respectively.]

Endorsed: Receipt of a copy of the within is hereby admitted this 11th day of February, 1918. F. W. Heatherly, Davis, Kemp & Post, Attorneys for complainants.

Filed Feb. 11, 1918. Chas. N. Williams, Clerk; by R. S. Zimmerman, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

AMENDED ANSWER OF DEFENDANT J. H. MERRIAM.

Comes now the defendant J. H. Merriam in the above entitled action, and severing from each of the other defendants above named, for his separate answer to the bill of complaint of complainants (amended and filed pursuant to the stipulation herein entered into between this defendant and complainants above named), and admits, alleges and denies as follows:

FIRST SEPARATE DEFENSE.

1. Admits that he is a citizen and resident of the state of California, and of the southern district and division thereof, and that the real estate in said bill of complaint described is situate in said state, district and division. Alleges that he is without knowledge respecting any of the other matters or things alleged in paragraph I of said bill of complaint.

2. Alleges that he is without knowledge respecting any of the matters or things contained in paragraph II of said bill of complaint.

3. Alleges that he is without knowledge respecting any of the matters or things contained in said paragraph III of said bill of complaint.

4. Alleges that he is without knowledge respecting any of the matters or things contained in paragraph IV of said bill of complaint.

5. Alleges that he is without knowledge respecting any of the matters or things contained in paragraph V of said bill of complaint.

6. Alleges that he is without knowledge respecting any of the matters or things contained in paragraph VI of said bill of complaint and in the schedule thereunto attached, marked "Exhibit B" and made a part thereof.

7. Alleges that he is without knowledge respecting any of the matters or things contained in paragraph VII of said bill of complaint.

8. Denies that the said real estate situate in the city of Los Angeles, California, at the time of said Ferdinand Fensky's death was reasonably, or at all, worth the sum of \$2,500.00, or any other or larger sum than the sum of \$600.00. Denies that said real estate owned in San Pedro was then worth about \$14,000.00, or any other or larger sum than the sum of \$3,600.00. Denies that said real estate in Orange County was then worth about \$10,000.00, or any other or larger sum than \$2,000.00. Denies that the whole of the property and estate within the state of Cali-

fornia owned and possessed by the intestate was then worth \$100,000.00, or any other or larger sum than \$6,700.00. Alleges that he is without knowledge respecting any of the other matters or things contained in paragraph VIII of said bill of complaint, and in particular that he is without knowledge respecting the value of any property or estate that may have been left by said intestate, if any such property was so left, other than that within the state of California.

9. Admits that on October 15, 1903, by the consideration of the superior court of Los Angeles County, California, the said Jeanette Fensky was appointed and became administratrix of the estate of said Ferdinand Fensky, her deceased husband, and admits that as such administratrix the said Jeanette Fensky came into possession of the real estate in the state of California in said paragraph IV of said bill of complaint described, or attempted to be described. Alleges that the said Jeanette Fensky as such administratrix did on the 26th day of October, 1903, make and file in the said superior court an inventory of property belonging to the estate of the said Jeanette Fensky, a copy of which said inventory is hereunto attached and marked Exhibit 1, and which is hereby referred to and made a part hereof. Alleges that in and by said inventory it was, and is, declared that the said property therein described was community property of the said Ferdinand Fensky, deceased, and of the said Jeanette Fensky, and the said property was therein designated and described as such community property. Alleges that this defendant is informed and believes, and he there-



fore alleges, that within a short time after the filing of the said inventory the complainants herein, and each of them, had actual notice of the contents thereof, and in particular of the description of the several items of property therein inventoried, and of the respective amounts at which the said items were severally appraised therein, and of the fact that the said property, and the whole thereof, was in and by said inventory declared to be, and described as, the community property of the said Ferdinand Fensky, deceased, and of the said Jeanette Fensky; and this defendant is further informed and believes, and he therefore alleges, that at all times subsequent to the filing of said inventory and appraisement the complainants, and each of them, had actual knowledge of all of the facts and circumstances under which the said property was acquired by the said Jeanette Fensky, and of all the facts and circumstances connected with the acquisition of the same bearing upon or determinative of the question whether or not the property was in fact such community property, or that, failing such actual knowledge, they had notice of circumstances sufficient to put a reasonable man upon inquiry as to whether or not the said property was such community property, and that at all of said times they had the means of ascertaining whether or not such property was in fact such community property. Admits that the said Jeanette Fensky inventoried but one promissory note for the sum of \$400.00, and admits that said inventory was duly signed by the said Jeanette Fensky as such administratrix. This defendant is

informed and believes and he therefore alleges that said inventory was a true and correct inventory of all of the property belonging to the estate of the said Ferdinand Fensky. Alleges that he is without knowledge respecting any of the other matters and things contained in paragraph IX of said bill of complaint.

10. Alleges that he is without knowledge respecting any of the matters and things contained in paragraph X of said bill of complaint.

11. Alleges that he is without knowledge respecting any of the matters and things contained in paragraph XI of said bill of complaint.

12. Admits that the complainant, Louisa Pickens, on or about July 29, 1904, executed and delivered to the said Campbell for the said Jeanette Fensky a release or quitclaim releasing and conveying unto the said Jeanette Fensky all of the right, title and interest of the said Louisa Pickens in and to the property and estate of her said deceased brother, and admits that on or about August 3, 1904, the complainant, Johanna Schutt, executed and delivered to the said Campbell for the said Jeanette Fensky a similar release and quitclaim releasing and conveying unto the said Jeanette Fensky all of the right, title and interest of the said Johanna Schutt in and to the property, assets and estate of her said deceased brother. Alleges that he is without knowledge respecting any of the other matters and things contained in paragraph XII of said bill of complaint.

13. Alleges that on the 5th day of November, 1903, the said superior court of the county of Los Angeles,

state of California, duly gave and made its order and decree in the said proceeding therein entitled "In the Matter of the Estate of Ferdinand Fensky, deceased," wherein and whereby there was set apart unto the said Jeanette Fensky, the widow of the said decedent, all of those certain lots or parcels of land described in paragraph III of said bill of complaint under the designation (B) as and for the homestead of her, the said Jeanette Fensky. That thereafter on the 30th day of March, 1905, the said Jeanette Fensky, as administratrix of the estate of the said Ferdinand Fensky, deceased, filed therein her final account as such administratrix in the said superior court. That thereafter such proceedings were taken and had by said superior court that on the 11th day of April, 1905, the said superior court duly gave and made its judgment and decree wherein and whereby the said superior court ordered, adjudged and decreed that said deceased left surviving as his only heirs at law his widow, Jeanette Fensky, his nephew, George Fensky, and the following brothers and sisters, to wit: Friedrich Fensky, Ida Wendt, Hulda Richter, Johanna Schutt, Louise Pickens, Augusta Krauss, and Charles Fensky, and that by reason of the said conveyance to the said widow, as set forth herein and in said petition for distribution all the residue of the property of said estate as thereafter in said decree described, and all other property belonging to said estate whether described therein or not, was distributed as follows: To Hulda Richter, sister of said deceased, one-sixteenth part thereof, and all the remainder to Jeanette

Fensky, the widow of said deceased. That in said decree the real property described is the same as that described in said Exhibit 1 hereunto attached, excepting only that portion thereof theretofore set apart to said Jeanette Fensky as such probate homestead as aforesaid; that thereafter on the 11th day of April, 1905, the said decree of said superior court was duly entered in book 115 of Minutes and Orders, at page 87; that thereafter the said Jeanette Fensky presented and filed in said superior court the receipts of the several distributees in said decree named for all of the property by said decree distributed to them, respectively, as aforesaid. Alleges that the complainants, and each of them, had actual notice of the pendency in the said superior court of the said proceeding entitled "In the Matter of the Estate of Ferdinand Fensky, deceased" at all times after the institution of said proceeding, and that they, and each of them, had actual notice of the filing by the said Jeanette Fensky of her said final account and petition for distribution therein, and that they, and each of them, had actual notice of all of the matters and things appearing in and by the records in said proceeding, but that nevertheless neither of the complainants did then or at any time thereafter appear therein or object to any matter or thing in connection therewith. Denies that at the time of her death in 1908, the said Jeanette Fensky was the owner of the several parcels of real property described in paragraph XIII of said bill of complaint, or of any thereof. Alleges that he is without knowl-



edge respecting the other matters and things contained in paragraph XIII of said bill of complaint.

14. Admits that the said Jeanette Fensky died on July 8, 1908. Denies that prior to her death, and on or about September 18, 1907, or at any other time, or at all, the said Jeanette Fensky executed a deed conveying, or purporting to convey, to defendant Eugene Wellke, real estate situated in the state of Kansas. Denies that on or about May 28, 1907, or at any other time or at all, the said Jeanette Fensky signed a deed conveying, or purporting to convey, to the defendant Alma J. Schmidt the north 60 feet, or any other part, of the east 200 feet of lot 8 in Michner's Subdivision of the northeast 38.86 acres in block U. T. & B., Addition to Pasadena, California. Admits that some time prior to her death the said Jeanette Fensky made out and signed each of the other deeds mentioned in paragraph XIV of said bill of complaint, to wit, the deeds to the real property in said bill of complaint designated, respectively, as "Item 1", "Item 2", "Item 3", "Item 4", "Item 5", "Item 6", "Item 7", "Item 8", "Item 9", "Item 10", "Item 11" and "Item 12"; but denies that said deeds, or either or any of them, merely purported to convey the respective parcels of real property therein severally described. Denies that all or any, or either of said deeds so made out by the said Jeanette Fensky were not delivered to the respective grantees named therein until after the death of the said Jeanette Fensky; denies that the title or ownership of the said property did not pass to the said grantees, or that at the time of her death the said Jeanette

Fensky was the owner of the same, or any thereof, and in this behalf these defendants allege that all of said deeds, so made out by the said Jeanette Fensky were by her delivered to the respective grantees named therein prior to the death of the said Jeanette Fensky and that the title and ownership of the said property passed to the grantees named therein, respectively, and that at the time of her death the said Jeanette Fensky had no right, title, or interest therein or in any part thereof. Admits that this defendant wholly omitted said property from his inventory and account returned and filed in the estate of the said Jeanette Fensky, and admits that he paid over to each of the defendants Eugene Wellke, Amanda Katzung and Alma J. Schmidt \$235.61 out of the assets of her estate, and also turned over to them, the said defendants, certain notes belonging to the said Jeanette Fensky and certain property pursuant to the decree of distribution duly given and made in the said matter of the estate of Jeanette Fensky, deceased. Admits that the said Jeanette Fensky died on July 8, 1908, and that thereafter on or about August 1, 1908, on the petition of defendants Eugene Wellke, Amanda Katzung and Alma J. Schmidt, this defendant was appointed by the superior court of Los Angeles County, California, administrator of the estate of said Jeanette Fensky, deceased; admits that in said petition it was alleged that the whole of the property of the said Jeanette Fensky at the time of her death consisted of about \$2,300.00 in money. Denies that for some, or any, time after his appointment, or ever or at all, this defendant took no steps

whatever looking to the administration of the said estate, and denies that on September 8, 1909, or at any other time, or at all, this defendant filed in said matter a pretended inventory, or any other or different inventory than a true and correct inventory according to the best of his knowledge and belief. Alleges that on said 8th day of September, 1909, this defendant, as such administrator, made and filed in said superior court in the matter of the said estate a true and correct inventory of all of the property and assets of said estate which had then come to his knowledge, a copy of which said inventory is hereunto annexed and marked Exhibit 2 and which is hereby referred to and made a part hereof. Alleges that no other property or assets of said estate has at any time come to the knowledge of this defendant; that in and by said inventory it appears that the total assets of the estate of the said Jeanette Fensky amounted to the sum of \$3,509.38, consisting of \$2,324.38 of money, a claim against the defendant Amanda Katzung in the sum of \$135.00, and a note of the defendant Don Ferguson in the sum of \$1,050.00. Denies that upon the coming in of said inventory or on September 8, 1909, this defendant filed a purported final account of said estate, or any final account thereof other than a true and correct one according to the best knowledge and belief of this defendant. Admits that in said final account this defendant represented that property of the intestate in course of administration in the probate court of Shawnee County, Kansas, had been wholly administered and distributed, and further represented that

the said Jeanette Fensky left as her sole heirs at law the defendants Eugene Wellke, Amanda Katzung and Alma J. Schmidt. Denies that at the time the said final account was filed this defendant knew that the said Jeanette Fensky at the time of her death owned the real estate in paragraph XIII of said bill of complaint described, or any part thereof, and knew, or knew, that the same, or any part thereof, was distributable among the heirs at law of Ferdinand Fensky, the deceased husband of the said Jeanette Fensky, and knew, or knew, that neither the said Eugene Wellke, nor the said Amanda Katzung, nor the said Alma J. Schmidt had any interest whatsoever in the same, or in any part thereof. Denies that all or any of said deeds so made out by the said Jeanette Fensky were not delivered to the respective grantees named therein until after the death of the said Jeanette Fensky. Denies that the title and ownership, or title or ownership, of said property, or of any part thereof, did not pass to the said grantees, respectively, and at the time of her death, or at the time of her death, the said Jeanette Fensky was the owner of the same, or of any part thereof. Denies that this defendant well, or otherwise, or at all, knowing all or any of the matters and things in paragraph XIV of said bill of complaint alleged to be facts, pretended to make distribution of the estate of said Jeanette Fensky. Denies that this defendant pretended to act as administrator of the estate of said Jeanette Fensky. Denies that this defendant had full, or any, knowledge of the alleged, or any, rights of the complainants herein, or of either



of them. Denies that this defendant had the purpose and design, or purpose or design, of preventing complainants, or either of them, from securing their alleged just share, or any share, or the alleged share of either of them, of said estate of their deceased brother. Denies that this defendant has made no effort to represent said estate or has failed, refused and neglected in any respect, or at all, to administer the same fully, or to perform any act by him required or proper to be performed as such administrator in or about the administration of the said estate, or pretends to deny the alleged rights of these complainants, or either of them, in respect thereof, or any of said alleged rights, or any rights whatsoever of said complainants, or either of them. Denies that this defendant was at any time, or at all, employed by and acted as, or employed by, or acted as, attorney and agent, or attorney or agent for the defendants Eugene Wellke, Amanda Katzung, Minnie S. Farnsworth and Alma J. Schmidt, or either of said defendants, in any matter involving a conflict or controversy as between the interests of them, or either of them, and the interests of the estate of said Jeanette Fensky, deceased, or in any matter wherein the claims or interests of them, or either of them, were in conflict or inconsistent with the interests of said estate. Denies that he was employed by and acted as attorney and agent for, or was employed by, or acted as attorney or agent for the defendant Corrine Loveland, at any time or under any circumstances whatsoever, or at all. This defendant alleges that he is without knowledge respecting any of the other mat-

ters and things contained in paragraph XIV of said bill of complaint.

15. Admits that defendant Minnie S. Farnsworth is a daughter of defendant Eugene Wellke, and claims to be the owner of the property referred to in paragraph XV of said bill of complaint as described in "Item 3" thereof, but denies that such the claim of the said Minnie S. Farnsworth is by virtue of the alleged undelivered deed in said paragraph XV referred to, or by virtue of any undelivered deed whatever; allege that said defendant Minnie S. Farnsworth is the owner of the property referred to in said paragraph XV as described in "Item 3" thereof, to wit: "Lot 12 of A. F. Mills' Subdivision of the north half of lot 6 of the Berry and Elliott Tract, Pasadena, California"; denies that the right, title or interest which defendant Minnie S. Farnsworth has, or claims to have, in the said property last hereinbefore described, or any property of the estate of said Jeanette Fensky, is subject to the claim of said complainants, or either of them, as heirs at law, or an heir at law of the said Ferdinand Fensky, deceased, or of the said Jeanette Fensky, deceased. This defendant alleges that he is without knowledge respecting the other matters and things contained in paragraph XV of said bill of complaint.

16. Admits that the complainants, and each of them, had knowledge of the contents of the inventories in paragraph XVI of said bill of complaint referred to, filed, respectively, by the said M. T. Campbell, the said Jeanette Fensky, and this defendant. Admits that these complainants, and each of them, through their

children and otherwise, during the pendency of the proceedings in the probate court of Shawnee County, Kansas, in said bill of complaint alleged, and during the pendency of the said proceedings in the superior court of Los Angeles County, California, involving the administration of the estate of Ferdinand Fensky and of the estate of the said Jeanette Fensky, paid attention to said proceedings, and from time to time secured copies of said papers that were filed therein. This defendant alleges that he is without knowledge respecting the other matters and things contained in said paragraph XVI of said bill of complaint.

#### SECOND SEPARATE DEFENSE.

And for a second and separate answer to the complainants' bill of complaint, this defendant admits, alleges and denies as follows:

1. This defendant hereby refers to each and every the admissions, allegations and denials named in the first separate defense in this answer set forth, and by such reference incorporates the same in, and as part of, this second separate defense to said bill of complaint, to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

2. Alleges that after the death of Jeanette Fensky, deceased, in July 1908, this defendant was requested by her heirs, to wit, the defendant Eugene Wellke, brother, and Alma J. Schmidt and Amanda Katzung, sisters of said Jeanette Fensky, deceased, to act as

administrator with the will annexed of her estate, said brother and sisters being her surviving next of kin and all the heirs at law of said deceased; and they petitioned the said superior court in the said proceeding therein entitled "In the Matter of the Estate of Jeanette Fensky, deceased", and numbered "13286" on the register of said court, for the probate of the will of said deceased, and for the appointment of this defendant as the administrator with the will annexed of that portion of her estate in California. That said superior court then was and now is a court of general jurisdiction, having jurisdiction of the estates of deceased persons.

3. Alleges that this defendant was by said court duly appointed as such administrator and qualified as such, and letters of administration with the will annexed were issued to him in said proceeding, and he proceeded to administer upon said estate, and performed all of his duties as such, including the return of an inventory in which was listed and described all the property in California belonging to said Jeanette Fensky, deceased, which had come to the knowledge or possession of this defendant.

4. Alleges that by the terms of said will all of the property in the state of Kansas belonging to said testatrix was devised and bequeathed to the nephews and nieces of Ferdinand Fensky, the deceased husband of said testatrix, share and share alike, and no testamentary disposition was made of that portion of her estate situated in California.



5. Alleges that after the expiration of the time within which claims against said estate could be filed, and the said estate being in a condition to be closed, this defendant returned to said superior court in said proceeding his first and final account and report, as administrator with the will annexed of said estate of Jeanette Fensky, deceased, and his petition for distribution thereof, and after due notice given as required by law, and by the practice of said court, the said final account, report and petition for distribution came on regularly to be heard and was heard by said court, with evidence produced in support thereof, and the said court being fully advised in the premises gave and made its judgment and decree therein on the 22nd day of September, 1909, allowing and settling said final account and distributing to the defendants Eugene Wellke, Alma J. Schmidt and Amanda Katzung, as the heirs of said Jeanette Fensky, deceased, the balance of said estate then in the hands of this defendant, as such administrator with the will annexed, and any other property belonging to said estate, as property not disposed of by said will. That thereafter, to wit, on the 22nd day of September, 1909, said judgment and decree was duly entered in book 145 of Minutes and Orders, at page 351; that no appeal has ever been taken therefrom, and that the same is, and for more than eight years last past has been, final and in full force and effect. That thereafter this defendant distributed the said balance of the property belonging to said estate in his hands to said distributees, and obtained their respective receipts for their distributive

shares thereof, and has never since had in his possession, or under his control any money or property belonging to said estate. That thereafter, to wit, on the 13th day of October, 1909, this defendant presented said receipts showing said distribution to have been made in accordance with said decree of distribution, and thereupon the said court duly and regularly gave and made its order in said administration proceeding discharging this defendant, as such administrator, and the sureties upon his administrator's bond from further liability as such in that behalf, and thereafter this defendant, under the law and probate practice of the state of California, had no further powers, rights, obligations or duties to exercise or perform in his capacity as such administrator with the will annexed of the estate of Jeanette Fensky, deceased, or in any other capacity or on behalf of said estate. That said order of discharge was thereafter, to wit, on the 13th day of October, 1909, duly entered in book 7 of Orders and Decrees, at page 87, and that no appeal has ever been taken therefrom and that the same is, and for more than eight years last past has been final and in full force and effect.

6. Alleges that in all said matters and proceedings this defendant acted in good faith and with an earnest purpose to perform faithfully and in all respects in conformity to the law in such case made and provided each and every his duties and obligations as such administrator, and that he had no notice or knowledge of the existence of any of the alleged facts respecting the supposed existence of any property or estate of the

said Jeanette Fensky, deceased, other than the property by him set forth in the said inventory by him filed in the matter of her said estate, and had no notice or knowledge respecting the alleged non-delivery by the said Jeanette Fensky, during her lifetime, of the deeds mentioned in paragraph XIV of said bill of complaint, nor of the alleged facts that the property described in the said several deeds, or any part thereof, belonged to, or constituted a part of, the property and estate of the said Jeanette Fensky, deceased, nor of the alleged facts that all of the property belonging to said Jeanette Fensky at the time of her death had come to her from her deceased husband, nor that it was his separate property, nor that his collateral heirs made any claim to it, nor to any part of it, and that this defendant had no knowledge of any facts or circumstances that would put, or tend to put, him or any reasonable person upon inquiry respecting either, any or all of the alleged facts as to which it is hereinbefore in this paragraph averred that he had no notice or knowledge.

7. Alleges that the complainants, and each of them, by having failed to assert in connection with the said administration proceedings in the state of California upon the estate of Jeanette Fensky, deceased, any claim that the property of said Ferdinand Fensky, deceased, was the separate property of the said Ferdinand Fensky and was not community property of the said Ferdinand Fensky, and the said Jeanette Fensky, or any claim to, or right, title or interest in the estate of said Jeanette Fensky, or any part thereof as heirs at law or otherwise, and by having permitted to be

entered therein and to become final as aforesaid said judgment and decree of distribution wherein and whereby was determined as against all the world the persons who constituted the heirs at law of said Jeanette Fensky, and wherein and whereby there was distributed to the distributees in said decree named all of her estate within the state of California, and by having permitted said order of discharge of this defendant, as administrator with the will annexed of the said estate of Jeanette Fensky, to be made and entered in said proceedings and to become final therein, are forever estopped from asserting or claiming as against this defendant that complainants, or either of them, are heirs at law of the said Jeanette Fensky, or entitled to have distributed to them, or either of them, any part whatsoever of the property of the estate of said Jeanette Fensky, deceased, or that they have any claim or demand whatsoever against this defendant by reason of the alleged matters and things set forth in their said bill of complaint, or otherwise or at all.

### THIRD SEPARATE DEFENSE.

And for a third and separate defense to said bill of complaint this defendant admits, alleges and denies as follows:

1. This defendant hereby refers to each and all of the admissions, allegations and denials contained in the first separate defense in this answer set forth, and by such reference incorporates the same in, and as part of, this third separate defense to said bill of complaint to the same extent and with the same force and effect



as though each and every the said admissions, allegations, and denials were here set forth at large.

2. This defendant hereby refers to each and every the admissions, allegations and denials contained in the second separate defense in this answer set forth, and by such reference incorporates the same in, and as part of, this third separate defense to said bill of complaint, to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

3. That at all of the times herein and in said bill of complaint mentioned this defendant has been a citizen and resident of the state of California, and of the said Southern District thereof, and of the said Southern Division of said District, and that this defendant has, during the period comprehending all of said times, been actually present within said state, district and division for a total period of more than five years.

4. This defendant further alleges that, by reason of the facts hereinbefore alleged, the complainants herein, and each of them, have been and are guilty of laches in the premises, and that any supposed cause of action against this defendant that the said complainants, or either of them, may at any time prior to the filing of said bill of complaint have had by reason of the alleged facts set forth in said bill of complaint has become and is stale and barred by such the laches of said complainants, and of each of them, and do not entitle said complainants, or either of them, to any relief whatsoever in equity, or otherwise, against this defendant.

## FOURTH SEPARATE DEFENSE.

And for a fourth and separate defense to said bill of complaint this defendant admits, alleges and denies as follows:

1. This defendant hereby refers to each and all of the admissions, allegations and denials contained in the first separate defense in this answer set forth, and by such reference incorporates the same in, and as part of, this fourth separate defense to said bill of complaint to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

2. This defendant hereby refers to each and every the admissions, allegations and denials contained in the second separate defense in this answer set forth, and by such reference incorporates the same in, and as part of, this fourth separate defense to said bill of complaint, to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

3. That at all of the times herein and in said bill of complaint mentioned this defendant has been a citizen and resident of the state of California, and of the said Southern District thereof, and of the said Southern Division of said District, and that this defendant has during the period comprehending all of said times, been actually present within said state, district and division for a total period of more than five years.

4. This defendant is informed and believes, and therefore alleges, that the complainants, and each of

them, knew, or by the exercise of reasonable or any diligence could have known, all of the facts and circumstances concerning the matters and things in said bill of complaint alleged to have occurred prior to the death of the said Ferdinand Fensky, deceased, and knew, or by the exercise of reasonable or any diligence could have known, at the several times at which the same occurred, all of the supposed facts and circumstances concerning the matters and things alleged in said bill of complaint to have taken place commencing with the death of the said Ferdinand Fensky down to and including the month of June, 1912, in connection with the administration of the estate of said Ferdinand Fensky, deceased, both in the state of California, and in the state of Kansas, during which period the complainants transferred and released to the said Jeanette Fensky their respective interests in the said estate of Ferdinand Fensky, deceased; and in particular that complainants, and each of them, knew, or by the exercise of reasonable or any diligence could have known, prior to the said distribution of the estate of Jeanette Fensky, deceased, as aforesaid, all of the supposed facts and circumstances concerning the matters and things in their bill of complaint alleged to have taken place prior to the death of said Ferdinand Fensky, and after his death in connection with the respective administrations upon his said estate in the state of California and in the state of Kansas; that the complainants, and each of them, by having failed to assert in connection with the said administration proceedings in the state of California upon the estate of Jeanette

Fensky, deceased, any claim that the property of Ferdinand Fensy was separate property of said Ferdinand Fensky and was not community property of said Ferdinand Fensky and said Jeanette Fensky, or any claim to or right, title or interest in said estate, or any part thereof as heirs at law, or otherwise, and by having permitted to be entered therein and to become final as aforesaid said judgment and decree of distribution, wherein and whereby was determined as against all the world the persons who constituted the heirs at law of said Jeanette Fensky, and wherein and whereby was distributed to the distributees in said decree named all of her estate within the state of California, and by having permitted said order of discharge of this defendant, as administrator with the will annexed of the said estate of Jeanette Fensky, to be made and entered in said proceedings and to become final therein, and by having failed to assert in connection with said administration proceedings in the state of Kansas upon the estate of Ferdinand Fensky, deceased, in said bill of complaint alleged, any claim to, or right, title or interest in, said estate, or any part thereof, as heirs or otherwise, and by having permitted said judgment and decree of distribution to be entered by said probate court of Shawnee County, Kansas, and to become final therein, wherein and whereby was determined the persons who constituted the heirs at law of the said Ferdinand Fensky, deceased, and wherein and whereby there was distributed his estate in said state of Kansas to the distributees named in said decree last referred to, and by having permitted the said order



of discharge of said M. T. Campbell, as administrator of said estate of Ferdinand Fensky, deceased, within the state of Kansas to be made and entered in the administration proceedings last hereinbefore referred to and to become final therein, said complainants, and each of them, are now forever estopped from asserting or claiming, as against this defendant that complainants, or either of them, are heirs at law of the said Jeanette Fensky, or heirs at law of the said Fensky, or entitled to have distributed to them, or either of them, any part whatsoever of the property of the estate of Ferdinand Fensky, deceased, or any part of the property of the estate of Jeanette Fensky, deceased, or that they have any claim or demand whatsoever against this defendant by reason of the alleged matters or things set forth in their said bill of complaint, or otherwise, or at all.

#### FIFTH SEPARATE DEFENSE.

And for a fifth and separate defense to said bill of complaint this defendant admits, alleges and denies as follows:

1. This defendant hereby refers to each and all of the admissions, allegations and denials contained in the first separate defense in this answer set forth, and by such reference incorporates the same in, and as part of, this fifth separate defense to said bill of complaint to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

2. This defendant hereby refers to each and every the admissions, allegations and denials contained in

the second separate defense in this answer set forth, and by such reference incorporates the same in, and as part of, this fifth separate defense to said bill of complaint, to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

3. That on the 28th day of September, 1909, defendant Minnie S. Farnsworth, as plaintiff, commenced an action in the superior court of the state of California, in and for the county of Los Angeles, against defendants Don Ferguson, as defendant, which said action was entitled "Minnie S. Farnsworth, plaintiff, vs. Don Ferguson, defendant" and numbered 70454 on the register of said court. That in and by the complaint filed in said action said defendant Minnie S. Farnsworth, as plaintiff therein, prayed for a judgment and decree of said court against defendant Don Ferguson declaring and decreeing that title in and to the same real property in paragraph XIII of said bill of complaint herein designated as "Item 3", excepting, however, the north 15 feet thereof, was, at the time of the commencement of said action, and ever since the 10th day of July, 1908, had been, held by said defendant Don Ferguson in trust for the use and benefit of defendant herein Minnie S. Farnsworth, and praying further for an accounting between said defendant Don Ferguson and defendant herein Minnie S. Farnsworth for the rents, issues and profits of said property collected by said defendant Don Ferguson since the first day of October, 1908, and praying fur-

ther that said defendant Don Ferguson be required to convey the legal title of said property to said plaintiff, and praying further for general relief. As ground for the relief by said defendant Farnsworth therein prayed against said defendant Ferguson, said complaint set forth that for a long time prior to July 9, 1908, defendant Ferguson was acting as the trustee, agent and business advisor of said Jeanette Fensky, and that during all of said time said defendant Ferguson was sustaining a fiduciary relation to said Jeanette Fensky in all matters pertaining to the purchase, management and sale of real estate. That on or about October 11, 1905, and as the trusted agent and advisor of said Jeanette Fensky, and for and on her behalf, and at her request, defendant Ferguson negotiated and contracted with one Charles W. Witherell for the purchase of that certain lot of land last hereinbefore referred to, and purchased the same, for the price of \$16,000.00, all of which had been paid out of funds belonging to said Jeanette Fensky, that the said purchase was made for her and on her behalf and that said defendant Ferguson so represented it to said Jeanette Fensky, and in all subsequent transactions between the said defendant and the said Jeanette Fensky said property was represented, treated and considered as her property. That at all times from its purchase down to the time of the death of said Jeanette Fensky, defendant Ferguson had charge thereof for her and collected the rents for her and accounted to her for the collection thereof. That defendant Ferguson, without the knowledge or consent of said Jean-

ette Fensky, caused the contract for the purchase of said lot of land to be made in his name as the buyer, and thereafter upon the payment therefor, as aforesaid, in accordance with the terms of said contract, had caused the deed therefor to be executed in the name of said defendant Ferguson, as grantee, instead of said Jeanette Fensky, and to be delivered to him, and that said deed was so made out and delivered and conveyed the title to said property to defendant Ferguson prior to April 30, 1906, and was by him on the day last named recorded in the office of the county recorder of said Los Angeles County. That on or about September 18, 1907, said Jeanette Fensky, with the advice and assistance of said defendant Ferguson, made and executed to and in favor of defendant Minnie S. Farnsworth a deed purporting to convey the said property to said Minnie S. Farnsworth; that said deed was executed and acknowledged by said Jeanette Fensky and was by her delivered to defendant Ferguson with instructions to hold the same in his possession until the death of said Jeanette Fensky and then to deliver the same to defendant Farnsworth. That said Jeanette Fensky died on or about July 9, 1908, and that on July 10, 1908, defendant Ferguson caused said last mentioned deed to be recorded in the office of the county recorder of said Los Angeles County, and said deed was therein recorded, and that thereafter for two months or more said defendant Ferguson accounted to defendant Farnsworth for the rents and income of said property. That thereafter about October 1908, defendant Ferguson refused to account further to de-



fendant Farnsworth for said rents and income and asserted that title to said property was in his name and that *ie* belonged to him, and denied, and had ever since denied, that defendant Farnsworth was the owner of or entitled to the rents, issues and profits of said property. That from the time of the purchase of said property to and including the date of the deed to defendant Farnsworth, the said Jeanette Fensky was the equitable owner of said property and the title thereto was held in trust for her by defendant Ferguson, and that by virtue of said deed to defendant Farnsworth all the right, title and interest of said Jeanette Fensky in said property had passed to defendant Farnsworth, and defendant Farnsworth was at the time of filing said complaint, and had been since July 10, 1908, the equitable owner of said property and of every part thereof, and entitled to the rents, issues and profits thereof, and that defendant Ferguson then held the legal title to said property in trust for defendant Farnsworth. Thereafter defendant Ferguson filed in said action his answer to the complaint of defendant Farnsworth therein, and also his cross-complaint against defendant Farnsworth therein. Thereafter the said defendant Farnsworth filed therein her answer to the said cross-complaint; and thereafter on March 16, 1910, the said cause came regularly on for trial before the said superior court, sitting without a jury, upon the pleadings hereinbefore mentioned and then on file in said action. Evidence was thereupon introduced on the part of defendant Farnsworth and also on the part of defendant Ferguson, and, the

court having considered the evidence so introduced, the cause was thereupon continued for submission to March 18, 1910. On said date last mentioned, said cause again came on regularly for hearing, and the court having considered the evidence already introduced, and deeming it apparent that certain additional parties, to wit, defendants Eugene Wellke, Alma J. Schmidt and Amanda Katzung might have some right, title or interest in or to the property described in said complaint and the other pleadings in said action, and deeming it important that they should be made parties to said action in order that there might be a complete and equitable determination of the issues therein, thereupon made and entered an order therein setting aside the previous order of submission and allowing the plaintiff to file a supplemental or amended complaint and to bring in said additional parties. Thereupon said action was continued to be called up subsequently upon the filing of additional pleadings and the joining of issues thereon. Thereafter on May 31, 1910, such supplemental or amended complaint was filed in which defendant Farnsworth and defendant Eugene Wellke joined as plaintiffs, and in which defendant Ferguson, defendant Alma J. Schmidt and defendant Amanda Katzung were named as defendants. Thereafter each of said defendants therein named appeared and filed answers thereto. That in and by said supplemental and amended complaint and the said answers thereto there were put in issue the title to, and the right to the possession of, each of the several items of real property in paragraph XIII of

said bill of complaint described, and therein designated, respectively, as "Item 1", "Item 2", "Item 3", "Item 4", "Item 5", "Item 6", "Item 7", "Item 8", "Item 9", "Item 10", "Item 11", and "Item 12", and also all the right, title, claim and interest therein and thereto of the said parties to the said action, and of each of said parties. Thereafter the trial of said cause was regularly resumed on November 4, 1910, upon the issues raised by all the pleadings then on file therein, and evidence was thereupon introduced by and upon behalf of the respective parties; and thereafter the cause was ordered submitted and taken under advisement by said court. Thereafter on January 6, 1911, the said court ordered findings and judgment against defendant Ferguson; thereafter on October 24, 1911, the court made its findings and decision in writing and ordered judgment to be entered therein upon said findings and decision. Thereafter on December 27, 1911, the court gave and made its judgment therein upon its said findings wherein and whereby it was ordered, adjudged and decreed that defendant Farnsworth and defendants Schmidt and Katzung were the equitable owners in common of the said lot of land last hereinbefore referred to, and that the legal title thereof be, and the same was thereby, declared to be vested in said equitable owners as tenants in common, and that said defendant Ferguson be, and he was thereby required to convey the said legal title to said equitable owners. Thereafter on January 4, 1912, said judgment was duly entered therein, and thereafter pursuant to notice in that behalf duly given on January 16, 1912, defend-

ant Ferguson duly made a motion for a new trial in said action. Thereafter, on October 2, 1912, the said superior court duly gave and made its order granting such new trial therein. Thereafter said cause was set for trial for June 25, 1913. Thereafter on March 24, 1913, complainants herein filed in said action their complaint in intervention, and thereafter on May 17, 1913, said superior court gave and made its order allowing the complaint in intervention to be so filed as aforesaid.

Thereafter on October 27, 1913, the said complainants herein filed in said action their amended complaint in intervention; and thereafter on December 2, 1913, complainants herein filed in said action their second amended complaint in intervention; thereafter the defendants Farnsworth and Wellke demurred to said second amended complaint in intervention. Thereafter on April 29, 1914, said superior court duly gave and made and entered its order in said action sustaining such demurrer to said second amended complaint in intervention with leave to amend within ten days. Thereafter written notice of the entry of said order having been served on the attorneys for said interveners on the first day of May, 1914, and the time within which to file a third amended complaint in intervention having expired on May 11, 1914, and the complainants having, as such interveners, failed to amend their said second amended complaint in intervention within the time allowed by the court for that purpose, the said superior court on June 26, 1914, duly gave and made its judgment therein ordering,



adjudging and decreeing that the said interveners, complainants herein, and each of them, take nothing by their second amended complaint in intervention, or by their original complaint in intervention, or otherwise, in the said action, and that defendants Farnsworth and Wellke do have and recover of and from said interveners, complainants herein, and each of them, their costs and disbursements incurred in defending the said original complaint in intervention and said second amended complaint in intervention. That said judgment last referred to was duly entered therein on July 2, 1914.

That thereafter such proceedings were therein taken and had that said superior court on January 18, 1916, duly gave and made its judgment in said action in favor of defendant Farnsworth and defendant Wellke herein, and against defendants Ferguson, Schmidt and Katzung herein, which said judgment was thereafter on January 25, 1916, duly entered therein. That neither of said judgments therein entered, respectively, on July 2, 1914, and on January 25, 1916, has been modified, set aside or reversed, and that no appeal has ever been taken from either thereof, but that each of said judgments has become final and is in full force, virtue and effect, and binding upon the parties thereto.

That a copy of said second amended complaint in intervention is hereunto attached and marked Exhibit 3, and the same is hereby referred to and made a part hereof. That the causes of action in said second amended complaint in intervention alleged, and the matters thereby and thereunder litigated in said action,

are identical in all substantial particulars with the alleged cause of action set forth in the bill of complaint herein and with the matters herein sought to be litigated by complainants, and that the issues of said bill of complaint tendered are identical in all substantial particulars with those raised by said second amended complaint in intervention and in and by said judgment determined as aforesaid, and that the said alleged causes of action set forth in said second amended complaint in intervention were for the same identical cause of action as set forth in the bill of complaint herein,—the same identical cause of action being pleaded in said bill of complaint as was pleaded in said second amended complaint in intervention and no others. That the interveners who filed, and who are named in, said second amended complaint in intervention are the identical persons who are complainants herein, and that the defendants Eugene Wellke and Minnie S. Farnsworth are the identical persons who were and were named as plaintiffs in the said action, and that the defendants Alma J. Schmidt, Amanda Katzung and Don Ferguson were the identical persons who were and were named as defendants in said action. That the said judgment constitutes a prior adjudication against complainants, and each of them, of the alleged cause or causes of action and the whole thereof, and of all and singular the matters and things, set forth in said bill of complaint herein, and of each and every the claim and claims made by complainants, and each of them, in said bill of complaint; and that by reason of said judgment and of the facts hereinbefore in this

fifth separate defense alleged, said complainants, and each of them, are forever estopped from setting up or asserting the said alleged cause or causes of action, and all and singular the matters and things set forth in said bill of complaint, and any and all claims and demands against this defendant arising upon, or by reason of, the said matters and things in said bill of complaint alleged.

#### SIXTH SEPARATE DEFENSE.

And for a sixth and separate defense to said bill of complaint this defendant alleges and denies as follows:

1. This defendant hereby refers to each and all of the admissions, allegations and denials contained in the first separate defense in this answer set forth, and by such reference incorporates the same in, and as part of, this sixth separate defense to said bill of complaint to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

2. This defendant hereby refers to each and every the admissions, allegations and denials contained in the second separate defense in this answer set forth, and by such reference incorporates the same in, and as part of, this sixth separate defense to said bill of complaint, to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

3. That at all of the times herein and in said bill of complaint mentioned this defendant has been a citizen and resident of the state of California, and of the said Southern District thereof, and of the said Southern Division of said District, and that he has, during the period comprehending all of said times, been actually present within said state, district and division for a total period of more than five years.

4. Alleges that the defendant Farnsworth, by herself and by her predecessors in interest and title, for more than five years last preceding the filing of the bill of complaint herein, and at all times subsequent to said filing, has been, and now is, in the occupation and possession of the real estate in paragraph XIV of said bill of complaint described and referred to as "Item 3", and of the whole thereof, and of each and every lot and parcel of the same; that such her occupation and possession has at all times been continuous and uninterrupted and under claim of title, exclusive of other right, as her own, founding such claim upon the deed in said paragraph XIV alleged to have been by the said Jeanette Fensky executed, and, as therein alleged, purporting to convey all of the said real estate to defendant Farnsworth, and that such her occupation and possession has been, at all of said times, actual, exclusive, open, notorious, peaceable and adverse to the complainants and to all the world and under claim of right, and that during all of said times defendant Farnsworth, and her predecessors in interest and title, have paid all taxes, state, county and municipal, which have been levied and assessed upon or against the said



real estate, and upon the whole thereof, and upon each and every lot and parcel of the same. Alleges that the complainants herein have not, nor has either of them, nor have their respective ancestors, predecessors, or grantors, been seized or possessed of said lots or parcels of land within five years before the filing of said bill of complaint; nor have they, or any or either of them, been seized or possessed of the said real estate, or of any lot or parcel of the same, or of any part thereof, within five years before the filing of the said bill of complaint. Alleges that at the time the defendant Farnsworth came into the possession of the said real estate, to wit, more than five years prior to the filing of the bill of complaint herein, the same was of the value of \$16,000.00, or thereabouts; that the said real estate was then subject to a mortgage given to secure an indebtedness in the sum of \$9,000.00, and that there was then due and owing on account of such indebtedness the said sum of \$9,000.00; that at all times after defendant Farnsworth came into the possession of said real estate she paid out of her own moneys and funds all interest accruing on the said indebtedness and likewise out of her own moneys and funds paid for certain improvements thereon, and likewise paid certain assessments duly levied and assessed against the said real estate for local street improvements, and that the aggregate amount by said defendant Farnsworth so paid as aforesaid for taxes, interest, improvements and assessments exceeded any and all income by her derived from the said real estate by the sum of \$3,695.30 or thereabouts.

5. Alleges that the defendant Schmidt, by herself and by her predecessors in interest and title, for more than five years last preceding the filing of the bill of complaint herein, and at all times subsequent to said filing, has been, and now is, in the occupation and possession of the real estate in paragraph XIV of said bill of complaint described and referred to as "Item 6", and of the whole thereof, and of each and every lot and parcel of the same; that such her occupation and possession has at all times been continuous and uninterrupted and under claim of title, exclusive of other right, as her own, founding such claim upon the deed in said paragraph XIV alleged to have been by the said Jeanette Fensky executed, and, as therein alleged, purporting to convey all of the said real estate to defendant Schmidt, and that such her occupation and possession has been, at all of said times, actual, exclusive, open, notorious, peaceable and adverse to the complainants and to all the world and under claim of right; and that during all of said times defendant Schmidt and her predecessors in interest and title, have paid all taxes, state, county and municipal, which have been levied and assessed upon or against the said real estate, and upon the whole thereof, and upon each and every lot and parcel of the same. Alleges that the complainants herein have not, nor has either of them, nor have their respective ancestors, predecessors, or grantors, been seized or possessed of said lots or parcels of land within five years before the filing of said bill of complaint; nor have they, or any or either of them, been seized or possessed of the said real estate,

or of any lot or parcel of the same, or of any part thereof, within five years before the filing of the said bill of complaint. Alleges that at the time the defendant Schmidt came into the possession of the said real estate, to wit, more than five years prior to the filing of the bill of complaint herein, the same was of the value of \$. . . . ., or thereabouts; that the said real estate was then subject to a mortgage given to secure an indebtedness in the sum of \$1,500.00, and that there was then due and owing on account of such indebtedness the said sum of \$1,500.00; that thereafter the said defendant Schmidt paid, out of her own moneys and funds, on account of the indebtedness secured by said mortgage to the owner and holder thereof the sum of \$300.00, and to that extent satisfied the said mortgage; that at all times after defendant Schmidt came into the possession of said real estate she paid out of her own moneys and funds all interest accruing on the said indebtedness, and likewise out of her own moneys and funds paid for certain improvements thereon, and that the aggregate amount by said defendant Schmidt so paid as aforesaid for taxes, interest, and improvements exceeded any and all income by her derived from the said real estate by the sum of \$. . . . . or thereabouts.

6. Alleges that the defendant Wellke, by himself and by his predecessors in interest and title, for more than five years last preceding the filing of the bill of complaint herein, and at all times subsequent to said filing, has been, and now is, in the occupation and possession of the real estate in paragraph XIV of said

bill of complaint described and referred to as "Item 12", and of the whole thereof, and of each and every lot and parcel of the same; that such his occupation and possession has at all times been continuous and uninterrupted and under claim of title, exclusive of other right, as his own, founding such claim upon the deed in said paragraph XIV alleged to have been by the said Jeanette Fensky executed, and, as therein alleged, purporting to convey all of the said real estate to defendant Wellke, and that such his occupation and possession has been, at all of said times, actual, exclusive, open, notorious, peaceable and adverse to the complainants and to all the world and under claim of right; and that during all of said times defendant Wellke, and his said predecessors in interest and title, have paid all taxes, state, county and municipal, which have been levied and assessed upon or against the said real estate, and upon the whole thereof, and upon each and every lot and parcel of the same. Alleges that the complainants herein have not, nor has either of the, nor have their ancestors, predecessors, or grantors, been seized or possessed of said lots or parcels of land within five years before the filing of said bill of complaint; nor have they, or any or either of them, been seized or possessed of the said real estate, or of any lot or parcel of the same, or of any part thereof, within five years before the filing of the said bill of complaint. Alleges that at the time the defendant Wellke came into the possession of the real estate, to wit, more than five years prior to the filing of the bill of complaint herein, the same was of the value of



\$3,000.00, or thereabouts; that the said real estate was then subject to a mortgage given to secure an indebtedness in the sum of \$1,500.00, and that there was then due and owing on account of such indebtedness the said sum of \$1,500.00; that thereafter the said defendant Wellke wholly paid and discharged said indebtedness out of his own moneys and funds, and thereby procured said mortgage to be satisfied and released of record; that at all times after defendant Wellke came into the possession of said real estate he paid out of his own moneys and funds all interest accruing on the said indebtedness up to the discharge thereof as aforesaid, and likewise out of his own moneys and funds paid for certain improvements thereon; and that the aggregate amount by said defendant Wellke so paid as aforesaid for taxes, interest, and improvements exceeded any and all income by him derived from the said real estate by the sum of \$. . . . . or thereabouts.

7. Alleges that, by reason of the facts hereinbefore set forth, the defendants Minnie S. Farnsworth, Alma J. Schmidt and Eugene Wellke are, respectively, the owners, and in the possession, and entitled to the possession, of said several pieces of land of which they are herein alleged to have been in the possession for the respective periods of time hereinabove mentioned, and that any and all supposed claims or demands of said complainants, and of each of them, against the said defendants Minnie S. Farnsworth, Alma J. Schmidt and Eugene Wellke, respectively, are wholly and forever barred, and that any and all supposed

claims or demands of said complainants, and of each of them, against this defendant are wholly and forever barred.

#### SEVENTH SEPARATE DEFENSE.

And for a seventh and separate defense to said bill of complaint this defendant admits, alleges and denies as follows:

1. This defendant hereby refers to each and all of the admissions, allegations and denials contained in the first separate defense in this answer set forth, and by such reference incorporates the same in, and as part of, this seventh separate defense to said bill of complaint to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

2. This defendant hereby refers to each and every the admissions, allegations and denials contained in the second separate defense in this answer set forth, and by such reference incorporates the same in, and as part of, this seventh separate defense to said bill of complaint, to the same extent and with the same force and effect as though each and every the said admissions, allegations and denials were here set forth at large.

3. This defendant hereby refers to each and every the admissions, allegations and denials contained in paragraphs 4, 5, and 6 of the sixth separate defense in this answer set forth, and by such reference incorporates the same in, and as part of, this seventh separate defense to said bill of complaint, to the same extent and with the same force and effect as though

each and every the said admissions, allegations and denials were here set forth at large.

4. Alleges that after the making out and signing by the said Jeanette Fensky of the deed mentioned in paragraph XIV of said bill of complaint to the real property therein designated as "Item 1" and after the delivery thereof by said Jeanette Fensky to defendant Schmidt, as hereinbefore alleged, and immediately after the death of the said Jeanette Fensky, the defendant Schmidt entered into the occupation and possession of the said real property so designated as "Item 1" and remained in such occupation and possession of the whole thereof, and of each and every lot and parcel of the same, continuously until on or about June 24, 1911; that such her occupation and possession was at all times from and after her entering thereinto, as aforesaid, until on or about said June 24, 1911, continuous and uninterrupted and under claim of title exclusive of other right, as her own, founding such claim upon the said deed last mentioned, and that such her occupation and possession was, at all of said times, actual, exclusive, open, notorious, peaceable and adverse to the complainants and to all the world and under claim of right, and that during all of said times defendant Schmidt paid all taxes, state, county and municipal, which were levied and assessed upon or against the said real property and upon the whole thereof, and upon each and every lot and parcel of the same. Alleges that on or about said June 24, 1911, defendant Schmidt, for a good and valuable consideration by an instrument in writing by her duly exe-

cuted, acknowledged and delivered to the grantee therein named, bargained, sold and conveyed the said real property, and the whole thereof, to one M. L. Beal, the said grantee, and immediately thereupon delivered the possession of the said real estate to the said Beal. This defendant is informed and believes, and therefore alleges, that at all times thereafter the said Beal, and his successors in interest, have been and they now are in the actual, continuous and uninterrupted occupation and possession of the said real estate, and of the whole thereof, and of each and every lot and parcel of the same. Alleges that the complainants herein have not, nor has either of them, nor have their respective ancestors, predecessors or grantors been seized or possessed of the said real estate within five years before the filing of the said bill of complaint, nor have they, or any or either of them, been seized or possessed of the said real estate, or of any lot or parcel of the same, or of any part thereof, within five years before the filing of said bill of complaint. Alleges that shortly after the delivery by defendant Schmidt to the said Beal of the said instrument as hereinbefore alleged, and long prior to the filing of the bill of complaint herein, the said instrument was placed of record in the office of the county recorder of said county of Los Angeles. This defendant is informed and believes, and therefore alleges, that at the time of the delivery of said instrument to the said Beal, and at the time of the payment of the consideration therefor by him to defendant Schmidt, the said Beal was wholly without knowledge



respecting any of the supposed false and fraudulent matters, things and practices in said bill of complaint alleged, and that he accepted the delivery of said instrument and paid the said consideration, as aforesaid, in good faith.

5. Alleges that after the making out and signing by the said Jeanette Fensky of the deed mentioned in paragraph XIV of said bill of complaint to the real property therein designated as "Item 2" and after the delivery thereof by said Jeanette Fensky to defendant Wellke, as hereinbefore alleged, and immediately after the death of the said Jeanette Fensky, the defendant Wellke entered into the occupation and possession of the said real property so designated as "Item 2" and remained in such occupation and possession of the whole thereof, and of each and every lot and parcel of the same, continuously until on or about December . . . ., 1908; that such his occupation and possession was at all times from and after his entering thereinto, as aforesaid, until on or about said December . . . ., 1908, continuous and uninterrupted and under claim of title exclusive of other right, as his own, founding such claim upon the said deed last mentioned, and that such his occupation and possession was, at all of said times, actual, exclusive, open, notorious, peaceable and adverse to the complainants and to all the world and under claim of right, and that during all of said times defendant Wellke paid all taxes, state, county and municipal, which were levied and assessed upon or against the said real property and upon the whole thereof, and upon each and every lot and parcel

of the same. Alleges that at the time the defendant Wellke came into the possession of the said real estate as aforesaid the same was of the value of \$3,000.00 or thereabouts; that the said real estate was then subject to a mortgage given to secure an indebtedness in the sum of \$1,300.00, and that there was then due and owing on account of such indebtedness the said sum of \$1,300.00. That during the time defendant Wellke was in the possession of said real estate, he paid, out of his own moneys and funds, all interest accruing on the said indebtedness (the aggregate amount of which is not now known to this defendant). Alleges that on or about said December . . . ., 1908, defendant Wellke, for a good and valuable consideration by an instrument in writing by him duly executed, acknowledged and delivered to the grantee therein named, bargained, sold and conveyed the said real property, and the whole thereof, to one W. H. Warner, the said grantee, and immediately thereupon delivered the possession of the said real estate to the said Warner. This defendant is informed and believes, and therefore alleges, that at all times thereafter the said Warner, and his successors in interest, have been and they now are in the actual, continuous and uninterrupted occupation and possession of the said real estate, and of the whole thereof, and of each and every lot and parcel of the same. Alleges that the complainants herein have not, nor has either of them, nor have their respective ancestors, predecessors or grantors been seized or possessed of the said real estate within five years before the filing of the said bill of complaint, nor have

they, or any or either of them, been seized or possessed of the said real estate, or of any lot or parcel of the same, or of any part thereof, within five years before the filing of said bill of complaint. Alleges that shortly after the delivery by defendant Wellke to the said Warner of the said instrument as hereinbefore alleged, and long prior to the filing of the bill of complaint herein, the said instrument was placed of record in the office of the county recorder of said county of Los Angeles. This defendant is informed and believes, and therefore alleges, that at the time of the delivery of said instrument to the said Warner, and at the time of the payment of the consideration therefor by him to defendant Wellke, the said Warner was wholly without knowledge respecting any of the supposed false and fraudulent matters, things and practices in said bill of complaint alleged, and that he accepted the delivery of said instrument and paid the said consideration, as aforesaid, in good faith.

6. Allege that after the making out and signing by the said Jeanette Fensky of the deed mentioned in paragraph XIV of said bill of complaint to the real property therein designated as "Item 4" and after the delivery thereof by said Jeanette Fensky to defendant Wellke, as hereinbefore alleged, and immediately after the death of the said Jeanette Fensky, the defendant Wellke entered into the occupation and possession of the said real property so designated as "Item 4" and remained in such occupation and possession of the whole thereof, and of each and every lot and parcel of the same, continuously until on or about Novem-

ber . . . ., 1908; that such his occupation and possession was at all times from and after his entering thereinto, as aforesaid, until on or about said November . . . ., 1908, continuous and uninterrupted and under claim of title exclusive of other right, as his own, founding such claim upon the said deed last mentioned, and that such his occupation and possession was, at all of said times, actual, exclusive, open, notorious, peaceable and adverse to the complainants and to all the world and under claim of right, and that during all of said times defendant Wellke paid all taxes, state, county and municipal, which were levied and assessed upon or against the said real property and upon the whole thereof, and upon each and every lot and parcel of the same. Alleges that at the time the defendant Wellke came into the possession of the said real estate as aforesaid the same was of the value of \$2,000.00 or thereabouts; that the said real estate was then subject to a mortgage given to secure an indebtedness in the sum of \$1,000.00, and that there was then due and owing on account of such indebtedness the said sum of \$1,000.00. That at all times after defendant Wellke came into the possession of said real estate *be* expended, out of his own money and funds, the sum of \$185.00 in the payment of interest on the said indebtedness and in the payment of taxes levied and assessed on said property, and in the payment of the expenses and commissions on making a sale of said property. Alleges that on or about said November . . . ., 1908, defendant Wellke, for a good and valuable consideration by an instrument in writing by him



duly executed, acknowledged and delivered to the grantee therein named, bargained, sold and conveyed the said real property, and the whole thereof, to one Charles White, the said grantee, and immediately thereupon delivered the possession of the said real estate to the said White. This defendant is informed and believes, and therefore alleges, that at all times thereafter the said White, and his successors in interest, have been and they now are in the actual, continuous and uninterrupted occupation and possession of the said real estate, and of the whole thereof, and of each and every lot and parcel of the same. Alleges that the complainants herein have not, nor has either of them, nor have their respective ancestors, predecessors or grantors been seized or possessed of the said real estate within five years before the filing of the said bill of complaint, nor have they, or any or either of them, been seized or possessed of the said real estate, or of any lot or parcel of the same, or of any part thereof, within five years before the filing of said bill of complaint. Alleges that shortly after the delivery by defendant Wellke to the said White of the said instrument as hereinbefore alleged, and long prior to the filing of the bill of complaint herein, the said instrument was placed of record in the office of the county recorder of said county of Los Angeles. This defendant is informed and believes, and therefore alleges, that at the time of the delivery of said instrument to the said White, and at the time of the payment of the consideration therefor by him to defendant Wellke, the said White was wholly without knowledge

respecting any of the supposed facts and fraudulent matters, things and practices in said bill of complaint alleged, and that he accepted the delivery of said instrument and paid the said consideration, as aforesaid, in good faith.

7. Alleges that after the making out and signing by the said Jeanette Fensky of the deed mentioned in paragraph XIV of said bill of complaint to the real property therein designated as "Item 9" and after delivery thereof by said Jeanette Fensky to defendant Wellke, as hereinbefore alleged, and immediately after the death of the said Jeanette Fensky, the defendant Wellke entered into the occupation and possession of the said real property so designated as "Item 9" and remained in such occupation and possession of the whole thereof, and of each and every lot and parcel of the same, continuously until on or about July 1, 1909; that such his occupation and possession was at all times from and after his entering thereinto, as aforesaid, until on or about said July 1, 1909, continuous and uninterrupted and under claim of title exclusive of other right, as his own, founding such claim upon the said deed last mentioned, and that such his occupation and possession was, at all of said times, actual, exclusive, open, notorious, peaceable and adverse to the complainants and to all the world and under claim of right, and that during all of said times defendant Wellke paid all taxes, state, county and municipal, which were levied and assessed upon or against the said real property and upon the whole thereof, and upon each and every lot and parcel of the

same. Alleges that at the time the defendant Wellke came into the possession of the said real estate as aforesaid the same was of the value of \$5,000.00 or thereabouts; that the said real estate was then subject to a mortgage given to secure an indebtedness in the sum of \$2,500.00, and that there was then due and owing on account of such indebtedness the said sum of \$2,500.00. That during the time defendant Wellke was in the possession of said real estate he paid, out of his own moneys and funds, all interest accruing on account of said indebtedness (the aggregate amount of which is not now known to this defendant). Alleges that on or about said July 1, 1909, defendant Wellke, for a good and valuable consideration by an instrument in writing by him duly executed, acknowledged and delivered to the grantee therein named, bargained, sold and conveyed the said real property, and the whole thereof, to one Peter Orban, the said grantee, and immediately thereupon delivered the possession of the said real estate to the said Orban. This defendant is informed and believed, and therefore alleges, that at all times thereafter the said Orban, and his successors in interest, have been and they now are in the actual, continuous and uninterrupted occupation and possession of the said real estate, and of the whole thereof, and of each and every lot and parcel of the same. Alleges that the complainants herein have not, nor has either of them, nor have their respective ancestors, predecessors or grantors been seized or possessed of the said real estate within five years before the filing of the said bill of complaint, nor have they, or any or

either of them, been seized or possessed of the said real estate, or of any lot or parcel of the same, or of any part thereof, within five years before the filing of said bill of complaint. Alleges that shortly after the delivery by defendant Wellke to the said Orban of the said instrument as hereinbefore alleged, and long prior to the filing of the bill of complaint herein, the said instrument was placed of record in the office of the county recorder of said county of Los Angeles. This defendant is informed and believes, and therefore alleges, that at the time of the delivery of said instrument to the said Orban, and at the time of the payment of the consideration therefor by him to defendant Wellke, the said Orban was wholly without knowledge respecting any of the supposed false and fraudulent matters, things and practices in said bill of complaint alleged and that he accepted the delivery of said instrument and paid the said consideration, as aforesaid, in good faith.

8. Alleges that after the making out and signing by the said Jeanette Fensky of the deed mentioned in paragraph XIV of said bill of complaint to the real property therein designated as "Item 11" and after the delivery thereof by said Jeanette Fensky to defendant Wellke, as hereinbefore alleged, and immediately after the death of the said Jeanette Fensky, the defendant Wellke entered into the occupation and possession of the said real property so designated as "Item 11" and remained in such occupation and possession of the whole thereof, and of each and every lot and parcel of the same, continuously until on or



about April . . . ., 1912; that such his occupation and possession was at all times from and after his entering thereinto, as aforesaid, until on or about said April . . . ., 1912, continuous and uninterrupted and under claim of title exclusive of other right, as his own, founding such claim upon the said deed last mentioned, and that such his occupation and possession was, at all of said times, actual, exclusive, open, notorious, peaceable and adverse to the complainants and to all the world and under claim of right, and that during all of said times defendant Wellke paid all taxes, state, county and municipal, which were levied and assessed upon or against the said real property and upon the whole thereof, and upon each and every lot and parcel of the same. Alleges that at the time the defendant Wellke came into the possession of the said real estate as aforesaid the same was of the value of \$1,500.00 or thereabouts; that at all times after defendant Wellke came into the possession of said real estate he expended, out of his own moneys and funds, the sum of \$267.00 in improvements on said real estate. Alleges that on or about said April . . . ., 1912, defendant Wellke, for a good and valuable consideration by an instrument in writing by him duly executed, acknowledged and delivered to the grantee therein named, bargained, sold and conveyed the said real property, and the whole thereof, to one Marcus M. Moore, the said grantee, and immediately thereupon delivered the possession of the said real estate to the said Moore. This defendant is informed and believes, and therefore alleges, that at all times thereafter the said Moore,

and his successors in interest, have been and they now are in the actual, continuous and uninterrupted occupation and possession of the said real estate, and of the whole thereof, and of each and every lot and parcel of the same. Alleges that the complainants herein have not, nor has either of them, nor have their respective ancestors, predecessors or grantors been seized or possessed of the said real estate within five years before the filing of the said bill of complaint, nor have they, or any or either of them, been seized or possessed of the said real estate, or of any lot or parcel of the same, or of any part thereof, within five years before the filing of said bill of complaint. Alleges that shortly after the delivery by defendant Wellke to the said Moore of the said instrument as hereinbefore alleged, and long prior to the filing of the bill of complaint herein, the said instrument was placed of record in the office of the county recorder of said county of Los Angeles. This defendant is informed and believes, and therefore alleges, that at the time of the delivery of said instrument to the said Moore, and at the time of the payment of the consideration therefor by him to defendant Wellke, the said Moore was wholly without knowledge respecting any of the supposed false and fraudulent matters, things and practices in said bill of complaint alleged, and that he accepted the delivery of said instrument and paid the said consideration, as aforesaid, in good faith.

9. This defendant is informed and believes, and therefore alleges, that the complainants, and each of them, knew, or by the exercise of reasonable or any

diligence could have known, all of the facts and circumstances concerning the supposed false and fraudulent matters, things and practices in said bill of complaint alleged, long prior to the laying out and expending by defendants Minnie S. Farnsworth, Alma J. Schmidt and Eugene Wellke, respectively, of the said several sums of money by them hereinbefore alleged to have been laid out and expended, as aforesaid, and likewise long prior to the several transfers and conveyances hereinbefore alleged to have been made by defendants Alma J. Schmidt and Eugene Wellke, respectively; but that nevertheless complainants, and each of them, stood by and permitted said several sums to be by defendants Minnie S. Farnsworth, Alma J. Schmidt and Eugene Wellke, respectively, laid out and expended as aforesaid, and likewise stood by and permitted defendants Alma J. Schmidt and Eugene Wellke, respectively, to make the several transfers and conveyances hereinbefore by them alleged to have been made, as aforesaid, without objection by complainants, or either of them, to the making of any of said expenditures or of any of said conveyances, and without asserting any right, title or interest whatsoever in or to the several parcels of real property which were so conveyed as aforesaid or upon which expenditures were so made as aforesaid.

10. Alleges that of the said sums by the defendants Minnie S. Farnsworth, Alma J. Schmidt and Eugene Wellke, respectively, hereinbefore alleged to have been expended in connection with the several parcels of real

property in this seventh defense referred to, a large portion thereof (the exact amount of which is not at this time known to this defendant) was by defendants Minnie S. Farnsworth, Alma J. Schmidt and Eugene Wellke, respectively, laid out and expended subsequent to the time of the alleged discovery by complainants of the supposed false and fraudulent matters, things and practices in said bill of complaint alleged, and prior to the filing of said bill of complaint.

11. Alleges that the complainants have not paid or offered to pay to defendants Minnie S. Farnsworth, Alma J. Schmidt and Eugene Wellke, or either of them, any of the said sums by them in this seventh separate defense alleged to have been expended, respectively, on, or in connection with, the several parcels of land in this seventh defense referred to, or any part thereof; and that by reason of the matters and things in this seventh defense alleged it appears that complainants, and each of them, have wholly failed to do equity herein with respect to defendants Minnie S. Farnsworth, Alma J. Schmidt and Eugene Wellke.

WHEREFORE, this defendant, having thus made full answer to all the matters and things contained in said bill of complaint, prays to be dismissed hence with his costs in this behalf incurred.

Wm. J. Hunsaker

E. W. Britt

LeRoy M. Edwards.

Samuel Poorman, Jr.

Solicitors for defendant J. H. Merriam.



STATE OF CALIFORNIA, )  
County of Los Angeles. ) ss.

J. H. MERRIAM, being first duly sworn, deposes and says: That I am the defendant in the foregoing answer; that I have read said answer and know the contents thereof, and that the same is true of my own knowledge, except as to those matters which are therein stated upon information or belief, and as to those matters, I believe it to be true.

J. H. Merriam

Subscribed and sworn to before me  
this 11th day of February, 1918.

(Seal.) G. Harold Janeway  
Notary Public in and for the  
county of Los Angeles, state of  
California.

[Exhibits 1, 2 and 3, annexed to the foregoing amended answer, are omitted by stipulation. Exhibits 1 and 2 are printed in the Condensed Statement of the Evidence as Plaintiffs' Exhibits 18 and 21 respectively; and Exhibit 3 is printed as part of the amended answer of Eugene Wellke, et al.]

Endorsed: Receipt of a copy of the within is hereby admitted this 11th day of February, 1918. F. W. Heatherly, Davis, Kemp & Post, Attorneys for complainants.

Filed Feb. 11 1918 Chas N. Williams, Clerk by  
R. S. Zimmerman, Deputy Clerk.

## [TITLE OF COURT AND CAUSE.]

SUPPLEMENTAL ANSWER OF DEFENDANTS  
EUGENE WELLKE, ALMA J. SCHMIDT  
AND MINNIE S. FARNSWORTH.

Come now the above named defendants Eugene Wellke, Alma J. Schmidt and Minnie S. Farnsworth, and, by leave of court first had and obtained, file this their separate answer supplemental to their amended answer to the bill of complaint of complainants herein, and for such supplemental answer and for a further and separate defense to said bill of complaint, admit, allege and deny as follows:

1. On or about the 15th day of May, 1914, and prior to the filing of the bill of complaint herein, complainants Louisa Pickens and Johanna Schutt, as plaintiffs, filed their petition in the district court of Shawnee County, in the state of Kansas, (a court of record having general jurisdiction), against one M. T. Campbell, one Thomas Page and one E. C. Arnold, as defendants in the action thereby commenced, which said action was entitled, "Louisa Pickens and Johanna Schutt, plaintiffs, vs. M. T. Campbell, Thomas Page and E. C. Arnold, defendants," and was numbered 28758 on the register of said court. In and by said petition the plaintiffs in said action (complainants herein) prayed that a certain final settlement in said petition referred to as a "pretended final settlement" made by said Campbell as administrator of the estate of Ferdinand Fensky, deceased, in a proceeding in the Probate Court of Shawnee County, State of Kansas, (a court of record having jurisdiction of the estates

of deceased persons), entitled "In the Matter of the Estate of Ferdinand Fensky, deceased," be adjudged fraudulent and void, and that the same be set aside and held for naught; that the said Campbell be required to fully account to the plaintiffs for the distributive shares in said petition alleged to be the distributive shares of said plaintiffs in all of the estate of said Ferdinand Fensky which had come into the hands of said Campbell, and for which he was liable as such administrator, and that the same be administered according to law; that an account be taken and stated of the property and assets of the said Ferdinand Fensky, and that it be adjudged that each of the plaintiffs in said action was entitled to an undivided one-sixteenth of such property, and that the said district court of Shawnee County render judgment in favor of said plaintiffs and against the said Campbell for such amount as might be found to be due said plaintiffs by reason of the matters and things in said petition set forth and alleged, and against the defendant Thomas Page and the defendant E. C. Arnold, as sureties for the payment of such sum on the bond executed and given by the said Campbell as such administrator. Said petition further prayed that said district court of Shawnee County adjudge that the deeds and releases in said petition alleged to have been executed by said plaintiffs to said Jeanette Fensky were not binding upon said plaintiffs and, as between said plaintiffs and said Campbell, were wholly void and of no effect as receipts or otherwise. A copy of said petition is hereunto annexed and marked "Ex-

hibit 1," and the same is hereby referred to and made a part hereof. That the defendants Page and Arnold in said petition named were the sureties on the bond executed and given by said M. T. Campbell as administrator of the estate of said Ferdinand Fensky, and were, as such sureties and not otherwise, made defendants in said action. On or about June 6, 1914, all of said defendants appeared in said action and demurred to the petition of plaintiffs therein. Thereafter such proceedings were taken and had therein that said demurrers were by said district court of Shawnee County overruled. On or about the 10th day of December, 1914, said defendant M. T. Campbell filed his separate answer to said petition therein, a copy of which said answer is hereunto annexed and marked "Exhibit 2," and the same is hereby referred to and made a part hereof. On or about March 1, 1915, said M. T. Campbell died testate, and thereupon such proceedings were taken and had in said Probate Court of Shawnee County that Donald A. Campbell was, by order of said court duly given and made, appointed administrator with the will annexed of the estate of said M. T. Campbell, deceased. Thereafter, on or about the 10th day of April, 1915, such proceedings were taken and had in the said District Court of Shawnee County that an order was by said court duly given and made in said action, wherein and whereby said action was revived in the name of said Donald A. Campbell, as administrator with the will annexed of the estate of M. T. Campbell, deceased. Thereafter, on or about September 22, 1916, defendant



Donald A. Campbell as administrator aforesaid, filed his separate answer to the petition in said action, a copy of which said answer is hereunto annexed and marked "Exhibit 3," and which is hereby referred to and made a part hereof. On or about October 12, 1917, plaintiffs in said action filed therein their separate reply to the said answer of said Donald A. Campbell, as such administrator aforesaid, a copy of which said reply is hereunto annexed and marked "Exhibit 4," and which is hereby referred to and made a part hereof. In said action the defendants Page and Arnold also filed a separate answer to said petition, to which separate answer plaintiffs therein thereafter filed a reply; but the said separate answer of said defendants Page and Arnold and the said reply thereto of plaintiffs in said action, raise no issues other or different than those raised by the petition therein and the separate answers thereto of defendant M. T. Campbell, and of defendant Donald A. Campbell as administrator aforesaid, and the said reply of plaintiffs to said answer of said Donald A. Campbell.

2. The real property in paragraph III of said petition referred to is the same real property described or attempted to be described, in paragraph X of the bill of complaint herein. The contracts for deeds in paragraph III of said petition referred to are the same contracts for deeds referred to in paragraph VI of the bill of complaint herein. The deeds referred to in said paragraph III of said petition and the vendees therein named, respectively, are the same deeds and the same respective vendees referred to in paragraph

XI of said bill of complaint. That the amount in paragraph III of said petition alleged to be the unpaid balance of the purchase money under said contracts is the aggregate of the several indebtednesses referred to in paragraph VI of said bill of complaint, and set forth in the schedule attached to said bill and marked Exhibit B. The deeds of release and quitclaim in paragraph V and elsewhere in said petition referred to, are the same releases and quitclaims referred to in paragraph XII of said bill of complaint. The twenty-three promissory notes mentioned in paragraph V of said petition are the same promissory notes referred to in paragraph X of the bill of complaint herein and set forth in Schedule A attached thereto, excepting only the note in said bill of complaint alleged to have been signed by W. C. Stein, and also the note therein alleged to have been signed by one Simms. The purchasers referred to in paragraph XI of the bill of complaint herein and whose names are set forth in Schedule B thereunto attached, include all of the vendees referred to and named in paragraph VIII of said petition. The notes in paragraph IX of said petition alleged to have been made, respectively, by one Stein and one Simms, are the same notes in paragraph X of the bill of complaint herein alleged to have been signed, respectively, by W. C. Stein and by one Simms. The transactions referred to and described in said petition are the same transactions referred to and described in paragraphs IX, X, XI and XII, and in those allegations of paragraph XIII of said bill of complaint other than those setting forth the securing

by Jeanette Fensky of purchasers of certain property, the purchase by her of certain real estate and the ownership by her at the time of her death of certain real estate. The matters set forth in paragraph X of said petition and the averments therein contained are the same matters and averments in paragraph XVI of the bill of complaint herein set forth and contained.

3. Thereafter said action pending in said District Court of Shawnee County as aforesaid, came duly and regularly on for trial without a jury in said court, Second Division thereof, before the Hon. Geo. H. Whitcomb, Judge presiding therein, all of the parties to said action being represented at and throughout said trial by their respective counsel. Thereupon a trial of said action upon the merits was duly and regularly had and oral and documentary evidence was introduced by and on behalf of each of the parties to said action. Thereafter, on March 16, 1918, the said cause having been theretofore fully tried upon the merits and having been taken under advisement by the said District Court of Shawnee County, the same came regularly on for the decision and judgment of said court, and the said court being fully advised in the premises, thereupon found and decided in favor of defendants and against plaintiffs therein, and further found and decided that plaintiffs were not entitled to any recovery in said action. Thereupon said District Court therein rendered and entered its memorandum of opinion in writing, a copy of which said memorandum of opinion is hereunto annexed and marked "Exhibit 5" and which is hereby referred to and made a

part hereof. In conformity with such finding and decision said court thereupon, on said 16th day of March, 1918, duly gave and made its judgment in said action in the words and figures following, to wit:

“It is therefore ordered and adjudged that the defendants go hence without *day*, and recover of and from the plaintiffs herein their costs laid out and expended, taxed at \$. . . . ., and hereof let execution issue.”

4. Thereafter, on said 16th day of March, 1918, the plaintiffs in said action duly moved said court to vacate the decision and judgment by it rendered, given and made therein as aforesaid, and to grant plaintiffs therein a new trial of said action. Thereafter, on the 25th day of May, 1918, plaintiffs' said motion for a new trial having theretofore been heard and taken under advisement, and then coming on for decision, the court overruled the same and denied said new trial.

5. Thereafter, on the 31st day of May, 1918, plaintiffs in said action duly took and duly perfected an appeal to the Supreme Court of the state of Kansas from the said judgment and from the order overruling said motion for a new trial. Thereafter, on the 8th day of March, 1919, the said judgment and the said order denying a new trial were, and each of them was, by the said Supreme Court of the state of Kansas, duly and regularly affirmed in all respects as rendered, given and made as aforesaid. Thereupon the said judgment became final in all respects as so rendered, given and made, and the same is now in full



force, virtue and effect. In affirming said judgment as aforesaid, said supreme court of the state of Kansas rendered an opinion in writing, which said opinion is on file in the office of the clerk of said supreme court. Said opinion is reported in Vol. 179 of the Pacific Reporter at p. 343 under the title "Pickens, et al., vs. Campbell, et al.," and a copy of said opinion is hereunto attached and marked "Exhibit 6," and is hereby referred to and made a part hereof.

6. The issues raised and litigated in the said action and by the judgment of said District Court of Shawnee County finally determined, as aforesaid, adversely to complainants herein, are *indentical* with certain of the issues by said complainants sought to be raised and litigated in the present action; and in particular, with the following issues:

(a) That said M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, filed in the Probate Court of Shawnee County, State of Kansas, a pretended inventory and appraisal of the property of the estate of said decedent.

(b) That the said M. T. Campbell, in the interest of Jeanette Fensky, the widow of said decedent, concealed from the other heirs at law of said Ferdinand Fensky, deceased, and particularly from the complainants herein, the existence of certain contracts whereby the said Ferdinand Fensky in his lifetime had sold certain real estate in said petition described and situated in the city of Topeka, state of Kansas, to various persons, giving to the vendees contracts for deeds to be delivered to said vendees upon the payment by

them of the full amount of the purchase price of said real estate; that some time before his death the said Ferdinand Fensky had signed deeds naming as grantees therein the vendees in said contracts; that at the time of his death said deeds were not delivered, and were not deliverable until the terms of said contracts had been performed by said vendees.

(c) That immediately upon the death of the said Ferdinand Fensky, the said Jeanette Fensky came into the possession of certain notes and said contracts, owned by said decedent, and said deeds, of which fact and of the fact that said deeds had not been delivered the said Campbell was duly informed prior to his appointment as administrator of the estate of said decedent in the state of Kansas.

(d) That the said Campbell, in collusion with the said Jeanette Fensky and with her full knowledge and consent, and well knowing that complainants and the other heirs at law of said Ferdinand Fensky knew nothing of the existence of said contracts, contrived to deprive complainants of their share of the estate of said Ferdinand Fensky and to induce complainants to execute releases of said shares by representing to them, through said inventory and otherwise, that the entire amount of the estate distributable among the heirs at law of said Ferdinand Fensky amounted to about \$20,000.00, (of which they would receive one-half), that the money consideration for said releases would be advanced by said Jeanette Fensky, that said real estate had not been sold but by law passed to said widow, and that said brothers and sisters had no

interest therein, that in no event would the shares of each of said brothers and sisters, if all of said assets were collected, amount to more than one thousand dollars. That by means of such representations each of complainants, and each of the other brothers and sisters of said Ferdinand Fensky and in consideration of the payment to each of them of the sum of one thousand dollars, were induced to execute and did execute a quitclaim deed and release to and in favor of said Jeanette Fensky quitclaiming and releasing in favor of her all of the right, title and interest of said brothers and sisters, respectively, in and to the estate of said Ferdinand Fensky, both real and personal. That said deeds of release and quitclaim so obtained by the said Campbell were by him delivered to said widow and by her used as evidences of her right to all and singular the estate of said decedent, both in California and in Kansas,

(e) That the consideration for each of said deeds of release and quitclaim was paid by the said Campbell, as aforesaid, out of the funds in his hands as such administrator and belonging to the estate of said Ferdinand Fensky.

(f) That the said representations so made by Campbell were untrue for that in truth and in fact said estate distributable among said heirs amounted in value to more than \$70,000.00; that in truth and in fact said notes and certain mortgages hereinafter mentioned were all good and afterwards were collected; that in truth and in fact complainants' distributive shares of said estate exceeded four thousand

dollars to each of them; that in fact the money offered to be paid and paid for said releases was then in said Campbell's hands as assets of the said estate; that the said widow and the said Campbell, and each of them, knew that said representations were untrue and knew the facts to be in conformity with plaintiffs averments in said petition as stated in the preceding subdivision of this paragraph, and knew also that said real estate had been sold and that the unpaid purchase money therefor constituted personal assets of said estate, distributable among said brothers and sisters; that said contracts of sale were not recorded and all knowledge of their existence was sedulously and designedly kept from the said brothers and sisters by the said Jeanette Fensky and the said Campbell, and, for the purpose of further misleading and deceiving said brothers and sisters the said Jeanette Fensky and the said Campbell represented to one at least of said brothers that during his lifetime the said Ferdinand Fensky had sold the said real property and received the money therefor, and had executed and delivered deeds therefor; that after the death of the said decedent and for the purpose of further misleading and deceiving said brothers and sisters and each of them, the said Campbell and the said Jeanette Fensky caused said undelivered deeds, then in their possession to be recorded in the office of the Register of Deeds of Shawnee County, Kansas, and prevailed upon the vendees in said contracts to execute to the said Jeanette Fensky mortgages for the amount of unpaid purchase money due from said vendees at the time of the execu-



tion of such mortgages, and said mortgages were by the said Campbell omitted from said estate and turned over to the said Jeanette Fensky and by her converted to her own use; that in truth and in fact the deeds so recorded were signed by the said intestate but remained in his possession, awaiting the performance by the vendees of the conditions of said contracts, and the unpaid purchase money due from said vendees was a part of the personal estate of the said intestate, distributable as such among said brothers and sisters.

(g) That there came into the hands of said Campbell as a part of the property of the said intestate notes payable to said decedent other than those inventoried by the said Campbell; that one of these notes was made by one Stein, for one thousand dollars, and another of said notes was made by one Simms; that neither of said notes was disclosed to the brothers and sisters of said decedent, but were omitted from said inventory and concealed by said Campbell for the benefit of the said Jeanette Fensky, and that the proceeds of the same were collected and paid over by the said Campbell to the said Jeanette Fensky.

(h) That soon after the death of Ferdinand Fensky, said Jeanette Fensky was, by the Superior Court of Los Angeles County, California, appointed, and she duly qualified, as administratrix of the estate of said decedent; that she thereupon caused an inventory of said estate to be filed, and after having received from the said Campbell said deeds of release and quitclaim, represented to said Superior Court that she was the only person interested in said estate, and thereby

caused said estate to be closed and all of the assets thereof, amounting in actual value to about \$70,000.00, to be delivered to her.

(i) That on or about April 26, 1905, the said M. T. Campbell filed in the Probate Court of Shawnee County, Kansas, a pretended final account of his administration of said estate and therein averred that the inventory filed by him of moneys, notes and mortgages represented all the property belonging to said estate distributable among the heirs of said intestate; that said Jeanette Fensky had purchased all right, title and interest of the other heirs, and that she was at that time the sole owner of all the estate left by said decedent and the only heir interested in the settlement thereof. That the said Campbell further averred in said pretended final account that he had charged himself with all the personal property of said intestate. That by means of said pretended final account and the averments therein contained, the said Campbell procured said Probate Court to enter an order approving said pretended final report and discharging said Campbell as administrator and relieving the sureties on his bond from further obligation in the premises, upon the filing by the said Campbell of a receipt from the said Jeanette Fensky for the moneys, notes and mortgages in his hands belonging to said estate; and that thereafter the said Campbell so filed said receipt, and thereupon an order was entered by said Probate Court purporting finally to close and settle the estate of said decedent.

(j) That as a sister of said Ferdinand Fensky, deceased, each of complainants was and is entitled to one-sixteenth of his estate (except the Kansas real estate), and upon a lawful distribution thereof each of complainants would receive not less than \$4000.00; that the whole amount actually received by each of complainants was the sum of \$1000.00, paid by the said Campbell as aforesaid, acting for the said Jeanette Fensky, as a consideration for said deeds and releases; and that by reason of the premises, said Campbell was liable to the complainants for the remainder of their shares of said estate.

The allegations of the bill of complaint herein whereby complainants seek to raise and litigate the said issues, are essential to the statement of their supposed cause of action in the present suit, and their determination is determinative of the similar issues sought to be raised and litigated herein. The parties plaintiff named in said petition are the identical parties named as complainants in the bill of complaint herein. The defendant M. T. Campbell named in said petition, and the defendant Donald A. Campbell, as administrator aforesaid, as to whom said action was revived, as aforesaid, were, and each of them was, in privity with the defendants herein other than defendant Ferguson. The said judgment of the said District Court of Shawnee County constitutes a prior adjudication against complainants herein, and each of them, of the cause of action, and the whole thereof, therein litigated and determined, and by the bill of complaint herein sought again to be litigated, and of all and singular the mat-

ters, things and transactions alleged both in said petition in said action and in the bill of complaint herein, and of each and every the claim and claims made by plaintiffs, and each of them, in said action and in substantial identity by them and each of them made in the bill of complaint herein.

7. By reason of said judgment of said District Court of Shawnee County and of the facts hereinbefore in this supplemental answer set forth, said complainants, and each of them, are finally and forever estopped from setting up or asserting, herein or otherwise, the cause or causes of action in and by said judgment of said District Court of Shawnee County finally determined as aforesaid, and all and singular the matters and things in the bill of complaint herein set forth in substantial identity with the matters and things set forth in said petition in said action, and any and all claims and demands against these defendants, or either of them, arising upon, or by reason of, the said matters and things in the bill of complaint herein alleged in substantial identity with the matters and things in the petition in said action alleged, and in particular, are finally and forever estopped from raising or litigating in this action the matters, things and issues specifically mentioned in the last preceding paragraph hereof.

Wherefore, these defendants and each of them, having in their amended answer on file herein and in this their supplemental answer, made full answer to all the matters and things contained in said bill of





and Exhibit 6 is designated in the said Statement as Defendants' Exhibit No. F-1.]

Endorsed: Filed Jun. 9, 1919. Chas. N. Williams, clerk; by Maury Curtis, deputy clerk.

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[TITLE OF COURT AND CAUSE.]

(Minute order allowing amended petition in intervention and amendment to bill of complaint to be filed.)

Southern Division, Tuesday, July 29, 1919. July term. (Court met at the hour of ten o'clock a. m.)

Present: The Honorable Benjamin F. Bledsoe, District Judge.

Louisa Pickens, et al., Plaintiff, vs. J. H. Merriam, et al., Defendants. No. B-15 Equity.

This cause coming on at this time for further argument on final hearing, Emmet H. Wilson, Esq., counsel for the plaintiff, J. H. Merriam, Esq., and Samuel Poorman, Jr. Esq., counsel for the defendants, present in open court. Samuel Poorman, Jr., Esq., counsel for the defendants, concluded the argument on behalf of the defendants, and Emmet H. Wilson, Esq., counsel for the plaintiffs, concluded closing argument on behalf of the plaintiffs.

Whereupon, counsel for complainants presents an amended petition in intervention as to F. C. Richter, Charles F. Fensky, and George J. Fensky, and on motion of said counsel, it is ordered that the petition be withdrawn so far as it refers to F. C. Richter and George J. Fensky, and that it stand as the amended petition in intervention of Charles F. Fensky. Coun-

sel for defendants offers to file demurrer to and motion to dismiss said petition, which offer is denied by the court, exception taken, and the petition ordered filed, and ordered to be deemed denied by defendants. Whereupon, counsel for plaintiffs asks for leave to file an amendment to bill of complaint, which is ordered filed, and it is further ordered that the allegations of said amendment be deemed denied.

Arguments having been concluded it is ordered that this cause be submitted, counsel for the respective parties to file memoranda of authorities if they so desire.

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[TITLE OF COURT AND CAUSE.]

Amended Petition in Intervention of F. C. Richter,  
Charles F. Fensky and George J. Fensky.

To the Honorable the Judges of the District Court  
of the United States, for the Southern District  
of California:

Your petitioners, Charles F. Fensky, George J. Fensky and F. C. Richter, respectfully show:

1. That heretofore and on or about the 8th day of July, 1914, the above named complainants, Louisa Pickens and Johanna Schutt, filed their bill of complaint in the above entitled action, in which, among other things, the said complainants allege:

“That the complainants are surviving sisters and heirs at law of one Ferdinand Fensky, who died intestate at San Pedro, Los Angeles County, California, on August 7, 1903, and bring this suit to recover their distributive shares of the estate

of their deceased brother; that the said Ferdinand Fensky never had any children; that he left other heirs at law, besides the complainants herein, as follows: Jeanette Fensky, his widow (since deceased), Frederick Fensky, a brother, Ida Wendt, a sister (since deceased), Hulda Richter, a sister, Augusta Krauss, a sister, Charles Fensky, a brother, and George Fensky, a son of a brother who died during the lifetime of said intestate; that the said Ida Wendt died intestate subsequent to the death of Ferdinand Fensky, leaving a son, Conrad Wendt, as her sole heir at law; that after the death of the said Ferdinand Fensky and of the said Ida Wendt, and some years prior to the beginning of this suit, the said Conrad Wendt died unmarried, intestate and without issue or direct heirs, and each of the complainants as maternal aunt of the said Conrad Wendt succeed to one-seventh ( $1/7$ ) of the interest of the said Ida Wendt in the estate of the said Ferdinand Fensky, and the property hereinafter described."

2. That in or about September, 1907, the said Charles Fensky, named and referred to in the last preceding paragraph, died leaving Charles F. Fensky, one of your petitioners above named, as his sole surviving heir-at-law and next of kin; that the said Charles Fensky died intestate, and no administration has been had upon his estate; that your petitioner, Charles F. Fensky has succeeded to all of the interest of the said deceased Charles Fensky in and to the estate of the said Ferdinand Fensky.



3. That your petitioner George J. Fensky is the son of Herman Fensky, and that the said Herman Fensky died during the lifetime of the said Ferdinand Fensky; that your petitioner George J. Fensky is the same person who is referred to in paragraph III of the said bill of complaint as George Fensky.

4. That since the filing of the said bill of complaint the said Hulda Richter, a sister of the said Ferdinand Fensky, named and referred to in the said bill of complaint, has died intestate, and that your petitioner, the said F. C. Richter, is a son of the said Hulda Richter and is the sole surviving heir-at-law and next of kin of the said Hulda Richter; that no administration of the estate of the said Hulda Richter was ever had, and that your petitioner F. C. Richter succeeded to all interest of the said Hulda Richter in and to the estate of the said Ferdinand Fensky.

5. That these intervenors, your petitioners, each for himself alleges upon information and belief, and verily believes, that each, every and all of the facts alleged and set forth in the bill of complaint on file herein are true; that your petitioners adopt each, every and all of the allegations contained in the said bill of complaint as a part of this petition with the same force and to the same effect as if the same were fully set forth herein.

6. Your petitioners further allege that the same false statements and false representations as are alleged in the said bill of complaint to have been made to the complainants in the above entitled action were in like manner made to your petitioners Charles F.

Fensky and George J. Fensky and to the said Charles Fensky and to the said Hulda Richter, the deceased mother of your petitioner F. C. Richter, separately, and were by them severally believed to be true, and relying upon the truth of the said statements and representations and each and all of them, your petitioners George J. Fensky and the said Hulda Richter, the deceased mother of your petitioner F. C. Richter, and the said Charles Fensky, each executed and delivered to Jeanette Fensky a release and conveyance of their respective interests in the estate of the said Ferdinand Fensky, deceased; that the said false statements and the said false representations were made to your petitioners George J. Fensky and to the said Charles Fensky and Hulda Richter, and were believed by them to be true, and in reliance thereon each of them executed and delivered to the said Jeanette Fensky an assignment and conveyance of their several respective interests in the said estate of the said Ferdinand Fensky, deceased.

7. That the said complainants in and by their said bill of complaint, among other things, pray as follows:

“The complainants pray that in the event it shall be ascertained by the court, upon further proceedings herein, that other persons have or claim to have some interest in the estate of the said Ferdinand Fensky, that these complainants have leave to bring in said persons, and that any other heirs at law of the said Ferdinand Fensky, applying therefor, may be made parties hereto, to the end that the rights of all of the persons hav-

ing or claiming to have any interest in said estate, may be ascertained and determined.

“The complainants pray for each other, further and general relief as to the court may seem equitable and just”.

8. That your petitioner Charles F. Fensky is now a resident of the State of Missouri and has never been a resident of the State of California at any time.

WHEREFORE, your petitioners pray that they and each of them may be made parties plaintiff in the above entitled action, and that they and each of them be deemed and held to be entitled to all of the benefits to accrue from the said action, and to bear any and all expenses and liabilities incident thereto.

F. C. RICHTER

CHARLES F. FENSKY

GEORGE J. FENSKY

BY EMMET H. WILSON

Their Solicitor.

EMMET H. WILSON

Solicitor for Intervenors.

Endorsed: Filed Jul 29 1919 Chas. N. Williams,  
Clerk; by Maury Curtis, Deputy.

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[TITLE OF COURT AND CAUSE.]

AMENDMENT TO BILL OF COMPLAINT.

Now Come the complainants above named and by leave of Court first had and obtained, file this their amendment to their Bill of Complaint and hereby

amend the said Bill of Complaint in the following particulars, to-wit:—

(1) In paragraph IV of said Bill of Complaint, amend sub-paragraph (B) to read as follows:—

(B) Lots nineteen (19) to twenty-nine (29), inclusive, in Block C Peck's Subdivision of the Carolina Tract in the City of San Pedro, Los Angeles County, California.

(2) In paragraph IV of the said Bill of Complaint, amend sub-paragraph (D) to read as follows:—

(D) The west half of the southwest quarter of the northwest quarter of Section twenty-four (24), Township five (5) South, Range ten (10) West, San Bernardino Base and Meridian, in Orange County, California.

(3) In the said paragraph IV of said Bill of Complaint amend sub-paragraph (E) to read as follows:—

(E) The southwest quarter of the southeast quarter and the south half of the northwest quarter of the southeast quarter of Section four (4), Township five (5) South, Range ten (10) West, San Bernardino Base and Meridian, in Orange County, California.

(4) Amend the said Bill of Complaint by adding thereto a new paragraph to be numbered XVII, to read as follows:—

#### XVII.

That subsequently to the recording of the deeds from the said Jeanette Fensky to the defendants herein which said deeds are referred to in para-



graph XIV of the said Bill of Complaint, the defendant Eugene Wellke conveyed to persons other than defendants in this action the property described in paragraph XIII of the said Bill of Complaint as Item 2, Item 4, Item 9 and Item 11 and with the proceeds thereof purchased property known as No. 146 South Pasadena Avenue, and further described as Lot sixty (60) of Baker's Subdivision, and also purchased property known as No. 726 Manzanito Avenue, in the City of Pasadena, and that the said Eugene Wellke is now the owner of the said last mentioned property.

(5) Amend the said Bill of Complaint by adding thereto a new paragraph to be numbered XVIII, to read as follows:—

#### XVIII.

That in addition to the property purchased by said Jeanette Fensky with the money and in the circumstances mentioned and referred to in paragraph XIII of the said Bill of Complaint, the said Jeanette Fensky purchased the following described real estate in the County of San Bernardino, State of California:—

The East half of Farm Lot One eighty-one (181) of subdivision of lands belonging to Semi-Tropic Land & Water Company, as per map recorded in Book 6 of Maps, page 12, Records of San Bernardino County.

That the said Jeanette Fensky at the time she signed the deeds to the defendants herein men-

tioned and referred to in paragraph XIV of the said Bill of Complaint, signed a deed conveying the property last hereinabove described to the defendant Alma J. Schmidt.

That the said deed was signed at the same time and in the same circumstances as the said deeds referred to in the said paragraph XIV of the said Bill of Complaint, and these complainants in connection with the said deed to the said Alma J. Schmidt hereby refer to and repeat the allegations contained in the said Bill of Complaint in reference to the said deeds.

EMMET H. WILSON.

Solicitor for Complainants.

Endorsed: Filed Jul 29 1919 Chas. N. Williams,  
Clerk; by Maury Curtis, Deputy.

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[TITLE OF COURT AND CAUSE.]

### MEMORANDUM OPINION

Bledsoe, District Judge:—Many matters have been presented and argued with force and ability in this case and to all of them I have given particular and careful attention. The limits upon my time, however, and the demands of the case require only a brief statement of my conclusions.

The whole controversy depends primarily upon the question of whether or not Campbell, as administrator of the estate of Ferdinand Fensky, was actuated by a fraudulent purpose and intent when he conducted the probate proceedings in that estate in Kansas and made

his returns as administrator thereof. In all that Campbell had to do in the matter of buying out the respective interests of the collateral heirs, he was obviously acting as the agent of Mrs. Fensky and entitled to deal, and is now to be considered as having dealt, at arm's length with those whose interests he was seeking to purchase for his principal. Mrs. Fensky herself might with propriety have been appointed administrator of the estate in Kansas, and in such capacity could, again with the utmost propriety, have sought to purchase and actually have purchased, the interests of the other heirs. In so doing, however, and in the conduct of the negotiations with the heirs incidental thereto, she would have labored under no such fiduciary relation with respect to the purchase so made, as to cause the court to scrutinize her conduct in relation thereto with that nicety that is made use of when a fiduciary is dealing in his trust capacity.

So far as Campbell was called upon to and did deal in his purely fiduciary capacity, I am persuaded from a careful consideration of all of the evidence that he was at all times actuated by honest and bona fide motives. He believed genuinely, as the Supreme Court of Kansas in the case brought against him and his bondsmen has since said he had a right to believe, that the land contracts entered into by Fensky and joined in by the wife, did not serve to operate as an equitable conversion of the titles to the respective properties, and did not serve in any way to convey the legal or equitable titles to the realty described therein. If he had made a mistake in this matter, — if under the law

of Kansas such contracts actually did bring about an equitable conversion and serve to give to the vendor only a right to receive the money involved and thereby convert what had been real estate into personalty, it might be that the heirs remaining in ignorance of the precise nature of the transaction, might take advantage of it in a proceeding of this sort. *Griffith v. Gody*, 113 U. S. 89; *Pickens v. Merriam*, 242 Fed. 363, 372. However, no such mistake was made, and we now have the positive affirmative declaration of the highest court in Kansas that Campbell was right in his consideration of the nature of these contracts as failing to divest Mr. and Mrs. Fensky of the title to the realty covered thereby.

It cannot be true, as contended by complainants, that the decisions of the Supreme Court of Kansas having reference to these matters, are not controlling and binding upon this court. Surely in all matters affecting Kansas property, they would be binding. They serve to determine the status and ultimate vesting of Kansas property, and if this court were disposed upon principle to differ with the Kansas Supreme Court respecting its conclusion, which it is not, it would feel that the highest considerations of comity require that because of the positive declarations of the Kansas court with respect to the subject matter, its decisions should be followed herein. It is stated (*Pickens v. Campbell*, 179 Pac. 343, 345) and upon an independent investigation seems to be true, that through a long period of years, the consistent ruling of the Kansas courts has been to the effect that in a case such



as this, — where notes for the purchase price were not given, where time, either expressly or impliedly, was made of the essence of the contract, and where the right was given to the vendor upon a default on the part of the vendee immediately to declare a forfeiture and retake possession of the property agreed to be conveyed, — there is no conveyance of the legal title and no equitable conversion as is sought to be taken advantage of herein. Mr. Campbell then was entirely right in his attitude. Being right, fraud, intentional deceit, conduct approximating criminality, on his part, may not now be successfully charged against him.

In my judgment, Campbell, assuming that the law of Kansas did regard the precise contracts under consideration here as failing to divest the Fensky's of the title to the realty, was correct and he displayed commendable judgment in the attitude that he took. It is apparent that Campbell, all through the course of the proceedings and as is evidenced by his letters written, was anxious to avoid any controversy in court respecting the matter, for one reason and another; but that he was thoroughly imbued with the idea that if such a controversy should arise, the rights of Mrs. Fensky, as he had stated them, would be sustained. This is made especially apparent in the language contained in his letter of February 25, 1905 in evidence and which is fairly illustrative of his entire course of conduct. If there was no fraud on his part in this behalf, as I am constrained to hold, then no wrong

has been done to any of the complainants in the premises.

The persons who sold their interests in the estate to Mrs. Fensky were in no wise imposed upon. They had plenty of opportunity to discover the exact nature of the holdings of those who were occupying the lands in the Fensky addition; no impediment was placed in their way in the matter of securing complete information with respect to the precise character of the transactions which had enabled such persons to take possession of the property. They must be held to have been concluded by the assignments given by them to Mrs. Fensky and by the action of the Probate Court in Shawnee County based thereon. That they were paid for their assignments out of money in the hands of the administrator is of no moment. They conveyed and intended to convey all their interest in the estate for the consideration received. Whether the identical money passed came from Mrs. Fensky personally or from the administrator's bank account is immaterial. In view of their voluntary assignments, they received all that they were entitled to.

By the decrees of the Probate Courts in Kansas and in California, in the proceedings had consequent upon the death of Ferdinand Fensky, the widow became possessed and clothed with the right to the enjoyment, of the fruits of the estate thereby conveyed to her. Nothing that occurred thereafter served to deprive her of the beneficial use and enjoyment of such estate, together with the right of disposing thereof, which

these parties, in this proceeding at least, may now complain of.

In the absence of any fraud being practiced upon them, as is my deliberate conclusion, there is nothing in the complainants' case that is particularly attractive to a court of equity. The widow who had been married to the deceased for over thirty years preceding his demise, equitably at least, was entitled to claim a large share of the results of their joint frugality. Neither she nor those in privity with her seem to have been the recipients of a disproportionate share of that property. No fraud having been shown respecting her acquisition of the property, there is nothing in its ultimate disposition that, under all the circumstances, seems to be at all shocking to the conscience of the Chancellor.

A decree in usual form in favor of the defendants will be entered.

March 17, 1920.

Endorsed: Filed Mar 17 1920 Chas. N. Williams,  
Clerk Maury Curtis, Deputy.

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[TITLE OF COURT AND CAUSE.]

FINAL DECREE.

This cause came on to be heard at the July, 1919, term, and was argued by counsel and submitted to the court for decision; and thereafter, upon consideration thereof it was and is hereby ordered, adjudged and decreed as follows, viz.:

1. That plaintiffs' complaint, as amended, be, and the same is hereby, dismissed; that the defendants be hence dismissed; and that the defendants have and recover from the plaintiffs Louisa Pickens, Johanna Schutt and Charles F. Fensky their costs of suit, taxed

at the sum of \$ <sup>Merriam 90.50)</sup> <sup>Wellke 46.55)</sup> \$137.05.

Done in open court this 15th day of April, 1920.

Benjamin F. Bledsoe

Judge.

Approved as to form as provided in Rule 45.

Emmet H. Wilson

Solicitor for plaintiffs.

Endorsed: Decree entered and recorded this 15th day of April, 1920. Chas. N. Williams, clerk By Maury Curtis, Deputy.

Filed Apr 15 1920 Chas. N. Williams, Clerk; By Maury Curtis, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

### ASSIGNMENT OF ERRORS.

Come now the complainants and the intervenor in the above entitled cause, by their solicitor, Emmet H. Wilson, and assign the following errors upon which they will rely on the prosecution of their appeal in the above entitled cause from the decree made and entered in the said cause by this honorable court on the 15th day of April, 1920, and the said complainants and the said intervenor say that the said decree is erroneous and is against the just rights of the said



complainants and of the said intervenor in the following respects:

The court erred in the following particulars, to wit:

1. In not holding and decreeing that the complainant, Louisa Pickens, was at the time of the filing of the bill of complaint herein a citizen and resident of the State of Kansas.
2. In not holding and decreeing that the complainant, Johanna Schutt, was at the time of the filing of the bill of complaint herein a citizen and resident of the State of Nebraska.
3. In not holding and decreeing that the intervenor, Charles F. Fensky, was and is the only son and heir at law of Charles Fensky, and that the said Charles F. Fensky, was at the time of the filing of the bill of complaint herein and at the time of the filing of the amended petition for intervention herein a citizen and resident of the State of Missouri.
4. In not holding and decreeing that at the time of the filing of the bill of complaint herein the defendants were all citizens and residents of the State of California and of the Southern District and Division thereof.
5. In not holding and decreeing that the real estate described in the bill of complaint, and in the amended bill of complaint, herein was situated in the State of California and in the Southern District and Division thereof.
6. In not holding and decreeing that the amount in controversy in this action exceeds and exceeded the

sum or value of \$3,000.00, exclusive of interest and costs.

7. In not holding and decreeing that the complainants herein are surviving sisters and heirs at law of Ferdinand Fensky, who died intestate at San Pedro, Los Angeles County, California, on August 7th, 1903.

8. In not holding and decreeing that the said Ferdinand Fensky never had any children and that he left as his only heirs at law the complainants, Louisa Pickens and Johanna Schutt, both sisters of the decedent, Jeanette Fensky, his widow, who died prior to the filing of the bill of complaint herein, Frederick Fensky, a brother, Ida Wendt, a sister, who died prior to the filing of the said bill of complaint, Hulda Richter, a sister, Augusta Krauss, a sister, Charles Fensky, a brother, and George Fensky, a son of a brother of the said decedent who died during the lifetime of the said Ferdinand Fensky.

9. In not holding and decreeing that the said Ida Wendt died, intestate, subsequently to the death of the said Ferdinand Fensky, and that she left a son, Conrad Wendt, as her sole heir at law, and that after the death of the said Ferdinand Fensky and of the said Ida Wendt, and prior to the filing of the bill of complaint herein, the said Conrad Wendt died unmarried, intestate and without issue or direct heirs.

10. In not holding and decreeing that subsequently to the death of the said Ferdinand Fensky, the said Charles Fensky died, intestate, leaving the intervenor Charles F. Fensky, as his sole surviving heir at law

and next of kin, and the said Charles F. Fensky succeeded to all of the interest of the said deceased Charles Fensky in and to the estate of the said Ferdinand Fensky.

11. In not holding and decreeing that each of the complainants, Louisa Pickens and Johanna Schutt, as maternal aunt of the said Conrad Wendt, succeeded to one-seventh of the interest of the said Ida Wendt in the estate of the said Ferdinand Fensky, deceased, and in the property described in the bill of complaint herein.

12. In not holding and decreeing that the intervenor, Charles F. Fensky, succeeded to one-seventh of the interest of the said Ida Wendt in the estate of the said Ferdinand Fensky, deceased, and in the property described in the bill of complaint herein.

13. In not holding and decreeing that at the time of the death of the said Ferdinand Fensky, he was the owner of the following described real estate, to wit:

(A) A piece or parcel of land situated in the City of Los Angeles, California, being as follows: Commencing at a point on the West line of New High Street distant 200 feet Southwest from the Southwest corner of Alpine Street and New High Street; thence Southwesterly along the West line of New High Street 73 feet to a point; thence Westerly at right angles to said West line of New High Street 65 feet to a point; thence Northeasterly at right angles to the last mentioned course parallel with and distant from the West line of New High Street 73 feet to a point; thence 65 feet Easterly to the West line of New High Street to

the point of beginning; being parts of Lots 10 and 11 in Block 33, of Ord's Survey, as recorded in Book 55, Page 66, Miscellaneous Records of Los Angeles County, California.

(B) Lots 19 to 29 inclusive in Block C, Peck's Subdivision of the Carolina Tract in the City of San Pedro, Los Angeles County, California.

(C) Lots 9 and 10 of Peck's Subdivision of Block 74 in said City of San Pedro, Los Angeles County, California.

(D) The west half of the southwest quarter of the northwest quarter of Section 24, Township 5 South, Range 10 West, S. B. M., in Orange County, California.

(E) The north ten (10) acres of the southwest quarter of the southeast quarter and the south half of the northwest quarter of the southeast quarter of section 4, Township 5, South, Range 10 West, S. B. M., in Orange County, California.

14. In not holding and deciding that about two or three months before the death of the said Ferdinand Fensky, he sold to one John Davis, under contract of sale, the south thirty (30) acres of the southwest quarter of the southeast quarter of Section 4, Township 5 South, Range 10 West, S. B. M., in Orange County, California, for the sum of \$1700.00; that the said Davis paid the sum of \$50.00 to the said Ferdinand Fensky, and paid the remainder of the purchase price to Jeanette Fensky, or her agent, after the death of Ferdinand Fensky.



15. In not holding and decreeing that at the time of the death of the said Ferdinand Fensky, he owned and possessed promissory notes aggregating about \$24,-647.64 in face value, executed by various persons and payable at various times, as set forth in the said notes.

16. In not holding and decreeing that at the time of the death of the said Ferdinand Fensky, various persons were indebted to him on account of purchase money on real estate sold by him to such persons during his lifetime.

17. In not holding and decreeing that at the times the said real estate was sold the said Ferdinand Fensky executed to the purchasers thereof contracts for deeds whereby he agreed to convey the real estate described therein upon the full payment of the purchase price.

18. In not holding and decreeing that at the time of the death of the said Ferdinand Fensky, there was unpaid a large amount of the purchase price of the various pieces of real estate sold by the said Ferdinand Fensky on contract of sale during his lifetime.

19. In not holding and decreeing that at the time of the death of the said Ferdinand Fensky there was unpaid on account of contracts for the sale of real estate executed by the said Ferdinand Fensky in his lifetime, covering real property owned by him in his own right in Topeka, Shawnee County, Kansas, the total sum of about \$22,965.75.

20. In not holding and deciding that Jeanette Fensky, the wife of Ferdinand Fensky, joined with the said Ferdinand Fensky in the execution of all contracts for the sale of real estate executed by the said Ferdi-

nand Fensky, and that she consented in writing to the execution of all such contracts executed by the said Ferdinand Fensky.

21. In not holding and decreeing that at the time of the death of the said Ferdinand Fensky, he possessed cash in the bank and in the possession of other persons amounting to about \$2,756.57.

22. In not holding and decreeing that at the time of the filing of the inventory and appraisement of the estate of Ferdinand Fensky, deceased, Lots 19 to 29 inclusive in Block C of the Peck's Subdivision of the Carolina Tract in the City of San Pedro, Los Angeles County, California, were reasonably worth the sum of \$4000.00.

23. In not holding and decreeing that at the time of the filing of the inventory and appraisement of the estate of Ferdinand Fensky, deceased, Lots 9 and 10 of Peck's Subdivision of Block 74, in the City of San Pedro, Los Angeles County, California, was reasonably worth the sum of \$10,000.00.

24. In not holding and decreeing that at the time of the filing of the inventory and appraisement of the estate of Ferdinand Fensky, deceased, the west half of the southwest quarter of the northwest quarter of Section 24, T. 5 S., R. 10 W., S. B. M., in Orange County, California, was reasonably worth the sum of \$1,000.00.

25. In not holding and decreeing that at the time of the filing of the inventory and appraisement of the estate of Ferdinand Fensky, deceased, the north ten (10) acres of the southwest quarter of the southeast

quarter and the south half of the northwest quarter of the southeast quarter of Section 4, T. 5 S., R. 10 W., S. B. M., in Orange County, California, was reasonably worth the sum of \$1,500.00.

26. In not holding and deciding that at the time of the filing of the inventory and appraisalment of the estate of Ferdinand Fensky, deceased, the contract of sale to John Davis for the south thirty (30) acres of the southwest quarter of the southeast quarter of Section 4, T. 5 S., R. 10 W., S. B. M., in Orange County, California, was reasonably worth the sum of \$1,650.00.

27. In not holding and decreeing that at the time of the filing of the inventory and appraisalment of the estate of Ferdinand Fensky, deceased, the whole of the property and estate owned and possessed by the said Ferdinand Fensky at the time of his death was reasonably worth the sum of about \$86,869.96.

28. In not holding and decreeing that on October 15th, 1903, Jeanette Fensky was, by the Superior Court of the State of California, in and for the County of Los Angeles, appointed, and that she became administratrix of the estate of the said Ferdinand Fensky, deceased, and that she duly qualified and thereafter acted as such until the final settlement of the said estate.

29. In not holding and decreeing that upon the death of the said Ferdinand Fensky, the said Jeanette Fensky came into the possession of about the sum of \$2,756.57 in cash and promissory notes aggregating a total of about \$24,647.64 and that she came into possession of all of the contracts of sale of real estate and of all evidences of indebtedness due to the said Ferdinand

Fensky at the time of his death, upon which there was then owing and unpaid about the sum of \$22,965.75.

30. In not holding and decreeing that, as administratrix of the estate of the said Ferdinand Fensky, deceased, the said Jeanette Fensky came into possession of the real estate owned by the said decedent at the time of his death in the State of California.

31. In not holding and decreeing that the said Jeanette Fensky knew the value of the said real estate in the State of California, and the contract of sale to John Davis to be about the sum of \$28,750.00 and designing to deceive and to defraud the complainants and the other heirs at law of the said Ferdinand Fensky, deceased, the said Jeanette Fensky caused the said real estate in California to be falsely and fraudulently appraised and inventoried for a total sum of \$6,200.00.

32. In not holding and decreeing that the said Jeanette Fensky, as administratrix of the estate of the said Ferdinand Fensky, deceased, did not return to the said Superior Court a true inventory of the personal property belonging to the said estate and that she inventoried only one promissory note for the sum of \$400.00, and did not inventory any of the other promissory notes or any of the contracts for the sale of real estate or other evidences of indebtedness belonging and owing to Ferdinand Fensky at the time of his death, or then belonging and owing to the said estate.

33. In not holding and decreeing that the said Jeanette Fensky, with a design to mislead, deceive and defraud the complainants and the other heirs of the said Ferdinand Fensky, deceased, purposely failed to list and



inventory any cash belonging to the said decedent which came into her possession, and also purposely failed to inventory any contracts or other evidences of indebtedness due to the said decedent from purchasers of real estate.

34. In not holding and decreeing that the inventory of the estate of the said Ferdinand Fensky, deceased, was signed by the said Jeanette Fensky, as administratrix of the said estate of Ferdinand Fensky, deceased, and was by her presented to the Superior Court of the State of California, in and for the County of Los Angeles, as and for a true inventory of the estate of the said decedent, and that in truth and in fact, the same was false and fraudulent and did not contain a large amount of property belonging to the said estate, and that the said inventory was intended by the said Jeanette Fensky to deceive the complainants as sisters and heirs at law and the other heirs of the said Ferdinand Fensky, deceased, including Charles Fensky, into the belief that the said estate consisted of nothing but the property in the said inventory and appraisal described and valued in the said inventory and appraisal and thereby to induce the said complainants and the said Charles Fensky and the other heirs to relinquish their just claims to their respective shares of the said estate.

35. In not holding and decreeing that after the death of the said Ferdinand Fensky, the said Jeanette Fensky, with the design to deceive and to defraud the complainants and the other heirs at law of the said Ferdinand Fensky, deceased, including the said Charles

Fensky, sent all of the promissory notes and all contracts and all evidences of indebtedness due to the said Ferdinand Fensky, deceased, to M. T. Campbell, who then resided at Topeka, Shawnee County, Kansas; that the said M. T. Campbell was the agent and representative in the said State of Kansas of the said Jeanette Fensky; that the said Jeanette Fensky entered into a fraudulent and collusive agreement with the said Campbell, whereby he should act as her agent and representative in obtaining releases from the complainants and the said Charles Fensky and the other heirs at law of the said Ferdinand Fensky, deceased; that pursuant to such agreement, and for the purpose of carrying it out the said Jeanette Fensky procured the said Campbell, by virtue of certain proceedings in the Probate Court of Shawnee County, Kansas, which was a court of record, then and there having jurisdiction of estates of deceased persons, to be, and he was, on September 9th, 1903, appointed administrator of the estate of the said Ferdinand Fensky, deceased.

36. In not holding and decreeing that on or about October 22nd, 1903, M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, filed in the Probate Court of Shawnee County, Kansas, an inventory which was represented by him to be a true inventory of all the goods, chattels, rights and credits of Ferdinand Fensky, deceased, which were by law to be administered in Kansas, and also an inventory of the real estate of Ferdinand Fensky, which said inventory showed personal property amounting to \$20,-927.64, consisting of \$4,297.14 cash in hand, and

showed a portion, but not all, of the promissory notes owing and belonging to the said estate, and that the said Campbell wholly failed to list in the said inventory a promissory note signed by W. C. Stein for the sum of \$2,400.00 and a promissory note executed by one Simms for the sum of \$420.00 and a promissory note executed by one Kimmerle for the sum of \$500.00, and that the said Campbell purposely omitted from the said inventory any reference to any indebtedness due to the said estate from purchasers of real estate under contracts of sale in Shawnee County, Kansas.

37. In not holding and decreeing that the real estate sold by Ferdinand Fensky during his lifetime, and for which the purchasers thereof were indebted to him, and after his death to his estate, was situated in and near the City of Topeka, Shawnee County, Kansas, and consisted in part of what was known as Fensky's First and Second Additions, about twelve acres in Kaw Reserve Number 5, Lot 61 on Kansas Avenue South, and part of Lot 71 on Kansas Avenue North.

38. In not holding and decreeing that the Kansas law regulating the descent and distribution of property at the time of the death of Ferdinand Fensky and at the time of the filing of the inventory of the estate of Ferdinand Fensky, deceased, in the Probate Court of Shawnee County, Kansas, provided that real estate of an intestate husband dying without children descends directly to his widow and no part thereof descends to his next of kin, and that, well knowing the provisions of the said law, and pursuing a design to deceive and to defraud the complainants herein and the said

Charles Fensky and the other heirs at law of the said Ferdinand Fensky, deceased, the said Jeanette Fensky and M. T. Campbell listed as real estate in the inventory filed in the Probate Court of Shawnee County, Kansas, the real estate sold by the said Ferdinand Fensky, in his lifetime under contracts of sale to purchasers of the said real estate; that the said Jeanette Fensky and the said M. T. Campbell knew that none of the contracts of sale of the said real estate had been recorded and knew that the complainants and the said Charles Fensky and the other heirs at law had no knowledge that the said real estate had been sold, and that the said Jeanette Fensky and the said Campbell concealed the fact that any of the said real estate had been sold, and, by listing the same as real estate, falsely represented to the complainants and to the said Charles Fensky and to the other heirs at law of the said Ferdinand Fensky, deceased, that, under the laws of the State of Kansas, the real estate so sold belonged to the widow of the said Ferdinand Fensky, deceased, and that the complainants and the said Charles Fensky and the other heirs at law of the said Ferdinand Fensky, deceased, had no interest therein.

39. In not holding and decreeing that it was the duty of Jeanette Fensky, as administratrix of the estate of the said Ferdinand Fensky, deceased, in California, and that it was the duty of M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, under the laws of both California and Kansas, to inventory and to account for the indebtedness due to the said estate from purchasers of real estate



under contracts of sale as personal assets of the said Ferdinand Fensky, deceased, distributable according to the law of California applicable to separate property of a deceased husband dying in California without issue, and leaving a widow and brothers and sisters.

40. In not holding and decreeing that for the purpose of carrying out the fraudulent design of securing from the complainants and from the said Charles Fensky and from the other heirs at law of the said Ferdinand Fensky, deceased, by misrepresentation and fraud, a release of their lawful claims against the said estate, Jeanette Fensky and M. T. Campbell concealed from the said complainants and from the said Charles Fensky and from the other heirs at law, the existence of any indebtedness owing to the said estate from purchasers under contracts of sale of real estate and omitted from the inventory of the said estate in California, and from the inventory of the said estate in Kansas, all indebtedness owing to the said estate on account of contracts of sale of real estate, and stated in the said inventories and otherwise that the said estate was actually Kansas real estate owned by the said Ferdinand Fensky, deceased, at the time of his death, and as such descended to and belonged solely to the said Jeanette Fensky.

41. In not holding and decreeing that under the laws of the State of Kansas where a vendor in a contract of sale of real estate dies without having executed a deed to the purchaser upon the payment to the administrator of his estate of the unpaid balance of the purchase money, the administrator was and is authorized,

and might and may be directed by the Probate Court to execute such deed with the same effect as though it had been executed by the vendor; that prior to his death, the said Ferdinand Fensky and the said Jeanette Fensky drew up and signed deeds of conveyance to the several purchasers holding contracts of sale of real estate from the said Ferdinand Fensky, but did not deliver the same; that all of the said underlivered deeds came into the hands of the said Jeanette Fensky upon the death of the said Ferdinand Fensky; that the said Jeanette Fensky and M. T. Campbell knew that the execution by the said Jeanette Fensky or by the said Campbell, as administrator of the estate of the said Ferdinand Fensky of the deeds to the said purchasers, or any of them, would reveal the fact that the said real estate had been sold and that the purchase money unpaid on account of contracts of sale constituted personal property of the said estate; that the said Jeanette Fensky and the said Campbell soon after the appointment of Jeanette Fensky as administratrix of the estate of Ferdinand Fensky, deceased, in California, and the appointment of the said Campbell as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, began negotiations with the persons who, during the lifetime of the said Ferdinand Fensky, had purchased real estate from him in Kansas under contracts of sale to accept the said underlivered deeds notwithstanding the death of the said Ferdinand Fensky, and to execute to the said Jeanette Fensky mortgages for the amount of the unpaid purchase money due under the said respective contracts

of sale; that substantially all of the persons who had purchased real estate from the said Ferdinand Fensky under contracts of sale accepted the said proposition, and the said deeds, all of which were dated, signed and acknowledged prior to the death of the said Ferdinand Fensky, were by the said Jeanette Fensky, through the said Campbell, delivered to the said respective purchasers and they executed to the said Jeanette Fensky mortgages for the respective unpaid balances of the purchase money; that the said Jeanette Fensky and the said Campbell for the purpose of deceiving and defrauding the complainants and the said Charles Fensky and the other heirs at law of the said Ferdinand Fensky, deceased, and for the purpose of inducing the said complainants and the said Charles Fensky and the other heirs at law to relinquish their just claims to their respective shares of the estate of the said Ferdinand Fensky, deceased, omitted from the inventory of the said estate in Kansas and from the inventory of the said estate in California and reference to any of the said mortgages, and that neither the said Jeanette Fensky nor the said Campbell, nor anyone else representing the estate of the said Ferdinand Fensky, accounted to the complainants or to the said Charles Fensky or to the other heirs at law for any part or share of the said mortgages, or any of them, or the proceeds thereof, and that the same remain and are unadministered assets of the estate of the said Ferdinand Fensky, deceased, in which the complainants and the intervenor and the other heirs at law

had and have an interest as heirs at law of the said decedent.

42. In not holding and decreeing that by means of the inventory filed by Jeanette Fensky in the estate of Ferdinand Fensky, deceased, in the Superior Court of the State of California, in and for the County of Los Angeles, and by means of the inventory filed by M. T. Campbell in the estate of Ferdinand Fensky, deceased, in the Probate Court of Shawnee County, Kansas, and by written statements made by them, and by oral statements made by the said Campbell, they represented that the estate of the said Ferdinand Fensky consisted of property situated in California of the value of about \$6,700.00 and property in the hands of the said Campbell amounting to about \$20,927.64, and represented that of the said estate, the widow, Jeanette Fensky, was entitled to one-half and that the remaining half was subject to distribution among the other heirs at law of the said Ferdinand Fensky, deceased, and represented that, according to the inventories prepared by them, the widow would receive about \$10,000.00 from the property in the hands of the said Campbell and about \$3,000.00 from property in her hands in California, and in addition thereto that the widow was entitled to the real estate situated in the State of Kansas described in the said Campbell's inventory filed in the estate of Ferdinand Fensky, deceased, in the Probate Court of Shawnee County, Kansas; that the said Jeanette Fensky and the said M. T. Campbell well knew, and it was a fact, that the California real estate owned by the said Ferdinand



Fensky at the time of his death was worth about \$28,750.00, and the personal property in California in the hands of the said Jeanette Fensky, including that which the said Jeanette Fensky turned over to the said Campbell for administration in the State of Kansas, was of the total value of about \$50,469.96; that almost immediately after the death of the said Ferdinand Fensky, the said Campbell began the collection of moneys due on account of promissory notes owing to the said Ferdinand Fensky and on account of contracts of sale of real estate made by the said Ferdinand Fensky in his lifetime; that prior to July, 1904, the said Campbell had collected of assets belonging to the estate of the said Ferdinand Fensky, deceased, either in cash or well secured mortgage notes more than \$11,800.00; that from time to time the said Campbell without the knowledge or consent of the complainants, or of the said Charles Fensky, or of any of the other heirs at law of the said Ferdinand Fensky, deceased, remitted to the said Jeanette Fensky large sums of money and retained other large sums of money in his hands for the purpose of carrying out the design and intent of securing for the said Jeanette Fensky the shares of the estate of the said Ferdinand Fensky, deceased, to which the complainants and the said Charles Fensky and the other heirs at law were justly entitled; that within a short time after the appointment of the said Campbell as administrator of the estate of Ferdinand Fensky, deceased, in the State of Kansas, he represented to the complainants, and to the said Charles Fensky, and to the other heirs at law of the said

Ferdinand Fensky, deceased, that it would take a long time to close up the estate of the said Ferdinand Fensky and that many of the promissory notes inventoried by him were of little or doubtful value, and that the makers of the said notes were accustomed to taking time for the payment of the same, and that the cost of administration would amount to a considerable sum, and that even if he should be able to collect the said notes, the shares of the said estate to which each of the complainants and the said Charles Fensky might be entitled would not exceed the sum of \$1,000.00; that the said Campbell, further represented that the real estate in and near Topeka, Kansas, all went to the widow, and that the property left by the said Ferdinand Fensky, deceased, was community property to which the said Jeanette Fensky was entitled to one-half absolutely, and that if the said complainants and the said Charles Fensky and the other heirs at law wanted their shares, the said Jeanette Fensky would buy from the complainants and from the said Charles Fensky their claims against the said estate for \$1,000.00 each; that each, all and every of the said representations was false, fraudulent and misleading and was by the said Campbell and by the said Jeanette Fensky known to be false, fraudulent and misleading; that the said promissory notes were all good and collectable; that the said Ferdinand Fensky left no debts and there was no just reason why the estate should not be closed, and final distribution made within reasonable time; that the amount which the complainants and the said Charles Fensky and the other heirs at law of the said Ferdinand Fensky, deceased, were en-

titled to receive from the said estate upon a full disclosure and accounting was about the sum of \$4,951.25 each; that the said property left by the said Ferdinand Fensky was not community property, but was his separate property; that the cost of administration ought to have been comparatively small and not exceeding the amount authorized by law; that the value of the estate was about \$86,869.96, instead of about \$24,000.00 as represented by the said Campbell and the said Jeanette Fensky; that, at the time the aforesaid representations were made, the complainants and the said Charles Fensky and the other heirs at law had no knowledge of the actual facts as herein stated but relied upon the said inventories and the said representations so made to them and believed the same; that, believing the said representations, the complainant, Louisa Pickens, on or about July 29th, 1904, accepted the sum of \$1,000.00 then paid to her by the said Campbell, and signed and delivered to him for the said Jeanette Fensky a transfer, release and quitclaim conveyance to the said Jeanette Fensky of all the right, title and interest of the said Louisa Pickens in and to all property of the estate of the said Ferdinand Fensky, deceased; that on or about August 3rd, 1904, the complainant, Johanna Schutt, relying on and believing the said inventories and the said representations made to her, accepted the sum of \$1,000.00 then paid to her by the said Campbell and signed and delivered to him for the said Jeanette Fensky a transfer, release and quitclaim conveying to the said Jeanette Fensky all the right, title and interest of the said

Johanna Schutt in and to all property, assets and estate of the said Ferdinand Fensky, deceased; that on or about the 25th day of July, 1904, Charles Fensky, the father of the intervenor, Charles F. Fensky, relying on and believing the said inventories and the said representations, accepted the sum of \$1,000.00 then paid to him by the said Campbell and signed and delivered to the said Campbell for the said Jeanette Fensky a similar transfer, release and quitclaim, releasing and conveying to the said Jeanette Fensky all of the right, title and interest of the said Charles Fensky in and to the property, assets and estate of the said Ferdinand Fensky, deceased; that the sum of \$1,000.00 so paid to each of the complainants and to the said Charles Fensky, as their respective full shares of the said estate, and for which they signed the said releases and quitclaim deeds, is all that either of the complainants or the said Charles Fensky ever received from the said estate of the said Ferdinand Fensky, deceased; that the said sums were so paid to the said complainants and to the said Charles Fensky by the said Campbell out of funds in his hands collected from the assets of the said estate; that the said Jeanette Fensky did not advance or pay anything whatsoever for the said releases and quitclaims, or for any of them; that the sum of \$1,000.00 received by each of the complainants and by the said Charles Fensky was only a part of the money then due to them, respectively, from the said estate of the Ferdinand Fensky, deceased, and that the said Jeanette Fensky parted with nothing of value for the said releases and quitclaims; that the said in-



struments executed by the said complainants and by the said Charles Fensky were, and are, and each of them was and is ineffective, without consideration and wholly fraudulent and void, for that the same were secured from the complainants and from the said Charles Fensky, and from each of them, upon the faith of the aforesaid false, fraudulent and misleading misrepresentations, statements, and representations made by the said Jeanette Fensky and by the said Campbell; that if the complainants and the said Charles Fensky had known or had any suspicion of the truth, no one of them would have executed the said or any releases and quitclaims, but would have insisted upon receiving their several respective full shares of the said real estate.

43. In not holding and decreeing that prior to March 30th, 1905, M. T. Campbell remitted to Jeanette Fensky about \$20,000.00 in cash and secured notes, being the proceeds of the assets of the estate of Ferdinand Fensky, deceased, which came into the hands of the said Campbell; that on or about March 30th, 1905, the said Jeanette Fensky filed in the Superior Court of the State of California, in and for the County of Los Angeles, a final account in the estate of the said Ferdinand Fensky, deceased, in which she represented that she had secured the interests of all of the brothers and sisters and other heirs at law of the said Ferdinand Fensky, deceased, and that she was the only one entitled to the said estate; that no part of the said amount was included in her said account; that there then being no debts due from the said Ferdinand Fensky,

deceased, and there being no opposition to the said final account, the same was received and approved by the said Superior Court and an order was entered discharging the said Jeanette Fensky as administratrix of the said estate and closing the said estate; that the said Jeanette Fensky thereupon caused to be filed for record in Los Angeles County and in Orange County, California, the releases and quitclaim deeds that had been executed by the complainants and by Charles Fensky, the father of the intervenor, Charles F. Fensky, and by the other heirs at law of the said Ferdinand Fensky, deceased; that upon the faith of the same the said Jeanette Fensky secured purchasers of the property in Orange County, California, and also of some of the property in San Pedro, California; that with the money and mortgages received from the said Campbell in the circumstances herein set forth, and with the money derived from the sale of the said real estate in California, the said Jeanette Fensky purchased real estate in Los Angeles County, the said Jeanette Fensky purchased real estate in Los Angeles County, California, and at the time of her death in 1908, she was the owner of the following described real estate, to wit:

Item 1.

The north 66 feet of the east 200 feet of Lot 80, L. H. Michner's Subdivision of the North 38 acres in Block U of Painter & Ball's Addition to Pasadena, California;

Item 2.

Lot 6 in Block A, New Fair Oaks Avenue Tract, Pasadena, California.

## Item 3.

Lot 12 of A. F. Mill's Subdivision of the north half of Lot 6 of the Berry & Elliott Tract, Pasadena, California.

## Item 4.

That portion of Lot "O" of the San Pasqual Tract, in Pasadena, California, described as follows: Beginning at a point in the east line of Lot Four, distant one hundred thirty-two feet south from the northeast corner thereof; thence west parallel with the north line of said lot two hundred feet to the east line of Magnolia Avenue one hundred feet; thence east parallel with the north line of said lot two hundred feet to the east line thereof; thence along the last mentioned line one hundred feet to the place of beginning.

## Item 5.

Lot 2 of the F. E. Crawford Tract, in Pasadena, California.

## Item 6.

Lot 16 of S. H. Doolittle's Subdivision of Lot 21 of B. F. Ball's Subdivision, in Pasadena, California.

## Item 7.

Lot 10 Peck's Subdivision of Block 74, in San Pedro, California.

## Item 8.

A piece of property in New High Street, in the City of Los Angeles, County of Los Angeles, State of California, described as follows: Commencing at a point on the west line of New High Street, distant 200 feet southwest from the southwest corner of Alpine Street and New High Street; thence southwesterly along the

west line of New High Street 73 feet to a point; thence westerly and at right angles to said west line of said New High Street 64 feet to a point; thence northeasterly and at right angles to said last mentioned course and distance and parallel with the west line of New High Street 73 feet to a point; thence easterly by a straight line 65 feet to the west line of New High Street to point of beginning, being parts of Lots 10 and 11, in Block 33 of Ord's Survey, according to the map in Book 53, Page 68, Miscellaneous Records of Los Angeles County, California.

Item 9.

The portion of Lot 21 of A. F. Mill's Subdivision of the north half of Lot 6 of the Berry & Elliott Tract, in Pasadena, California, beginning at the northwest corner of said Lot; thence east along the south side of Colorado Street 25 feet; thence south one hundred thirty-two and seventy-five hundredths feet to an alley; thence west 25 feet; thence north one hundred and thirty-two and seventy-five hundredths feet to the place of beginning, except a strip twelve and seventy-five hundredths feet wide off the north side, now a part of Colorado Street.

Item 10.

The south fifty feet of the north one hundred feet of Lot Eight, and the south fifty feet of the north one hundred feet of the west ten feet of Lot Seven of L. A. Michner's Subdivision of Lots Fourteen to Seventeen, both inclusive, of the Summit Avenue Tract, in Pasadena, California.



Item 11.

Lot 24 of Mary H. Newton Tract, in Pasadena, California.

Item 12.

Lot 7 in Block A of G. Weingarth's Subdivision B of the San Gabriel Orange Association Lands in Pasadena, California.

44. In not holding and decreeing that prior to the death of the said Ferdinand Fensky, the said Jeanette Fensky had no money or property whatsoever, and that all of the property, including the real estate in Pasadena, California, owned by her at the time of her death was acquired by the use of money and assets belonging to the estate of the said Ferdinand Fensky, deceased, and which was owned by the said Ferdinand Fensky in his lifetime in his own right and as his separate property.

45. In not holding and decreeing that the said Jeanette Fensky died on July 8th, 1908; that prior to her death and on or about September 18th, 1907, the said Jeanette Fensky, without any consideration therefor, signed a deed purporting to convey to the defendant, Amanda Katzung, certain real property on New High Street in the City of Los Angeles, California, and described as follows:

A piece of property in New High Street, in the City of Los Angeles, County of Los Angeles, State of California, described as follows: Commencing at a point on the west line of New High Street, distant 200 feet southwest from the southwest corner of Alpine Street and New High Street; thence southwesterly along the

west line of New High Street 73 feet to a point; thence westerly and at right angles to said west line of said New High Street 64 feet to a point; thence northeasterly and at right angles to said last mentioned course and distance and parallel with the west line of New High Street 73 feet to a point; thence easterly by a straight line 65 feet to the west line of New High Street to point of beginning, being parts of Lots 10 and 11, in Block 33 of Ord's Survey, according to the map in Book 53, Page 68, Miscellaneous Records of Los Angeles County, California; that on or about September 8th, 1907, the said Jeanette Fensky, without any consideration therefor, signed a deed purporting to convey to the said Amanda Katzung Lot 10 in Peck's Subdivision of Block 74, San Pedro, California; that at or about the same time, the said Jeanette Fensky, without any consideration therefor, signed a deed purporting to convey to the defendant, Eugene Wellke, real estate situated in the State of Kansas; that with funds received from M. T. Campbell, which were the proceeds of the estate of Ferdinand Fensky, deceased, in the State of Kansas, and with funds arising from the sale of the real property in Orange County, acquired by the said Jeanette Fensky from the said estate of Ferdinand Fensky, deceased, the said Jeanette Fensky, on or about May 28th, 1907, purchased the north 60 feet of the east 200 feet of Lot 8 in Michner's Subdivision of the northeast 38.86 acres in Block U of Painter & Ball's Addition to Pasadena, California, and thereafter signed a deed purporting to convey to

the defendant, Alma J. Schmidt, the said last mentioned property.

46. In not holding and decreeing that on or about August 14th, 1908, on the petition of the defendants, Eugene Wellke, Amanda Katzung and Alma J. Schmidt, the defendant, J. H. Merriam, was appointed by the Superior Court of the State of California, in and for the County of Los Angeles, administrator of the estate of Jeanette Fensky, deceased; that in the said petition it is alleged that the whole of the property of the said Jeanette Fensky at the time of her death consisted of about \$2,300.00 in money; that for some time after his appointment as administrator of the said estate, the said J. H. Merriam took no steps whatsoever looking to the administration of the said estate, but on September 8th, 1909, he filed in the said estate an inventory from which it appears that the total assets of the said estate of the said Jeanette Fensky, deceased, amounted to \$3,509.38, consisting of \$2,324.38 in cash, a claim against Mrs. Katzung for \$135.00 and a note of the defendant, Don Ferguson, for \$1,050.00; that upon the filing of the said inventory and upon September 8th, 1909, the defendant, J. H. Merriam, filed his final account of the said estate and in the said final account represented that the property of the said Jeanette Fensky in the course of administration in the Probate Court of Shawnee County, Kansas, had been wholly administered and distributed; and further represented that the said Jeanette Fensky left as her sole heirs at law the defendants, Eugene Wellke, Amanda Katzung and Alma J. Schmidt.

47. In not holding and decreeing that at the time the defendant, J. H. Merriam, filed his final account in the estate of Jeanette Fensky, deceased, he knew that the said Jeanette Fensky at the time of her death owned the real estate hereinafter described and knew that the same was distributable among the brothers and sisters of Ferdinand Fensky, the deceased husband of the said Jeanette Fensky, and the descendants of deceased brothers and sisters of the said Ferdinand Fensky, by right of representation, and knew that neither the said Eugene Wellke nor the said Amanda Katzung nor the said Alma J. Schmidt had any interest whatsoever in the said real property or in any thereof, the said real property being described as follows:

Item 1.

The north 66 feet of the east 200 feet of Lot 80, L. H. Michner's Subdivision of the north 38 acres in Block U of Painter & Ball's Addition to Pasadena, California;

Item 2.

Lot 6 in Block A, New Fair Oaks Avenue Tract, Pasadena, California.

Item 3.

Lot 12 of A. F. Mill's Subdivision of the north half of Lot 6 of the Berry & Elliott Tract, Pasadena, California.

Item 4.

That portion of Lot "O" of the San Pasqual Tract in Pasadena, California, described as follows: Beginning at a point in the east line of Lot Four, distant one hundred thirty-two feet south from the northeast



corner thereof; thence west parallel with the north line of said lot two hundred feet to the east line of Magnolia Avenue one hundred feet; thence east parallel with the north line of said lot two hundred feet to the east line thereof; thence along the last mentioned line one hundred feet to the place of beginning.

Item 5.

Lot 2 of the F. E. Crawford Tract, in Pasadena, California.

Item 6.

Lot 16 of S. H. Doolittle's Subdivision of Lot 21 of B. F. Ball's Subdivision of Pasadena, California.

Item 7.

Lot 10 Peck's Subdivision of Block 74, in San Pedro, California.

Item 8.

A piece of property in New High Street, in the City of Los Angeles, County of Los Angeles, State of California, described as follows: Commencing at a point on the west line of New High Street, distant 200 feet southwest from the southwest corner of Alpine Street and New High Street; thence southwesterly along the west line of New High Street 73 feet to a point; thence westerly and at right angles to said west line of said New High Street 64 feet to a point; thence northeasterly and at right angles to said last mentioned course and distance and parallel with the west line of New High Street 73 feet to a point; thence easterly by a straight line 65 feet to the west line of New High Street to point of beginning, being parts of Lots 10 and 11, in Block 33 of Ord's Survey, according to the

map in Book 53, Page 68, Miscellaneous Records of Los Angeles County, California.

Item 9.

The portion of Lot 21 of A. F. Mill's Subdivision of the north half of Lot 6 of the Berry & Elliott Tract, in Pasadena, California, beginning at the northwest corner of said lot; thence east along the south side of Colorado Street 25 feet; thence south one hundred thirty-two and Seventy-five hundredths feet to an alley; thence west 25 feet; thence north one hundred and thirty-two and seventy-five hundredths feet to the place of beginning, except a strip twelve and seventy-five hundredths feet wide off the north side, now a part of Colorado Street.

Item 10.

The south fifty feet of the north one hundred feet of Lot Eight, and the south fifty feet of the north one hundred feet of the west ten feet of Lot Seven of L. A. Michner's Subdivision of Lots Fourteen to Seventeen, both inclusive, of the Summit Avenue Tract, in Pasadena, California.

Item 11.

Lot 24 of Mary H. Newton Tract, in Pasadena, California.

Item 12.

Lot 7 in Block A of G. Weingarth's Subdivision B of the San Gabriel Orange Association lands in Pasadena, California; that the said Merriam well knew and it was, and is, a fact that some time prior to her death, about September 18, 1907, the said Jeanette Fensky

made out and signed deeds purporting to convey the said property owned by her as follows:

A deed to Alma J. Schmidt of the real estate described herein as Item 1 of the real estate owned by Jeanette Fensky at the time of her death;

A deed to Eugene Wellke of the real estate described in Item 2;

A deed to Minnie S. Farnsworth of the real estate described in Item 3;

A deed to the defendant Eugene Wellke of the real estate described in Item 4;

A deed to the defendant Amanda Katzung of the property described in Item 5;

A deed to the defendant Alma J. Schmidt of the real estate described in Item 6;

A deed to the defendant Amanda Katzung of the real estate described in Item 7;

A deed to the defendant Amanda Katzung of the property described in Item 8;

A deed to the defendant Eugene Wellke of the real estate described in Item 9;

A deed to the defendant Corrine Loveland of the property described in Item 10;

A deed to the defendant Eugene Wellke of the property described in Item 11;

A deed to the defendant Eugene Wellke of the property described in Item 12;

that none of the deeds so made out and signed by the said Jeanette Fensky were delivered to the respective grantees named therein until after the death of the said Jeanette Fensky; that the title and ownership of

the said property did not pass to the said grantees or to any of them; that at the time of her death the said Jeanette Fensky was the owner of all of the said real property; that the defendant, J. H. Merriam, well knew all of the facts herein set forth and, knowing the same, wholly omitted the said property and all of the same from his inventory and accounts in the estate of the said Jeanette Fensky, deceased, and pretended to make distribution of the estate of the said Jeanette Fensky and paid over to each of the defendants, Eugene Wellke, Amanda Katzung and Alma J. Schmidt the sum of \$235.61 out of the assets of the said estate, and also turned over to them certain notes and other property belonging to the said Jeanette Fensky.

48. In not holding and deciding that the defendant J. H. Merriam, while acting as administrator of the estate of Jeanette Fensky, deceased, was employed by and acted as attorney and agent for the defendants, Eugene Wellke, Amanda Katzung, Minnie S. Farnsworth and Alma J. Schmidt, and that at the same time the said defendant, Merriam, had full knowledge of the rights of the complainants and of the intervenor herein in and to the estate of Jeanette Fensky, deceased, and of the other brothers and sisters of Ferdinand Fensky, deceased, and the descendants of deceased brothers and sisters of the said Ferdinand Fensky, and that the said defendant, Merriam, purposed and designed to prevent the complainants and the intervenor and the other heirs at law from securing their just shares of the said estate of the said Ferdi-



nand Fensky, deceased, and of the said Jeanette Fensky, deceased.

49. In not holding and decreeing that the defendant, J. H. Merriam, although acting as administrator of the estate of Jeanette Fensky, deceased, and although requested so to do, made and has made no effort to represent the said estate or to have the administration thereof continued by the Superior Court of the State of California, in and for the County of Los Angeles, and has failed, refused and neglected further to administered the said estate and that he denies the rights of the complainants and of the intervenor herein and of the other heirs at law in respect thereof.

50. In not holding and decreeing that all of the estate of Ferdinand Fensky, deceased, was his separate property, and as such upon the death of his widow, Jeanette Fensky, the said estate and its avails descended ratably to the surviving brothers and sisters of the said Ferdinand Fensky and not to the sisters and brother of the said Jeanette Fensky.

51. In not holding and decreeing that the complainants herein have not received from the estate of their deceased brother, Ferdinand Fensky, anything except the sum of \$1,000.00 each, paid to them by M. T. Campbell, and that Charles Fensky, the father of the intervenor, Charles F. Fensky, did not receive from the estate of the said Ferdinand Fensky, deceased, anything except the sum of \$1,000.00 paid to him by the said M. T. Campbell, and that the said intervenor has not received anything whatsoever from the said estate of Ferdinand Fensky, deceased.

52. In not holding and decreeing that the defendant Minnie S. Farnsworth, is a daughter of the defendant, Eugene Wellke, and claims to be the owner of Lot 12 of A. F. Mills Subdivision of the north half of Lot 6 of the Berry and Elliott Tract, Pasadena, California, by virtue of a certain deed signed by the said Jeanette Fensky in her lifetime but which was not delivered prior to her death, and that whatever right, title or interest the said defendant had or has, or claimed or claims to have, in the said property is subject to the claims of the complainants and the intervenor herein as heirs at law of Ferdinand Fensky, deceased, and of Jeanette Fensky, deceased.

53. In not holding and decreeing that until about July or August, 1912, neither of the complainants nor the intervenor herein, nor Charles Fensky, the father of the said intervenor, had any notice or knowledge or suspicion of the truth respecting the amount, extent and value of the estate of Ferdinand Fensky, deceased, or of the frauds or fraudulent conduct of and fraudulent misstatements concerning the same made by M. T. Campbell and Jeanette Fensky and J. H. Merriam.

54. In not holding and decreeing that until about July or August, 1912, neither of the complainants nor the intervenor nor Charles Fensky, the father of the said intervenor, had any notice or knowledge or suspicion of the truth respecting the undelivered deeds made by Jeanette Fensky in her lifetime to the defendants, Wellke, Farnsworth, Katzung and Schmidt, or any notice or knowledge or suspicion of the fact that

the deeds signed by the said Jeanette Fensky on or about the 18th day of September, 1907, were made without consideration, or that the same were not delivered to the respective grantees named therein prior to the death of the said Jeanette Fensky.

55. In not holding and decreeing that during the month of July, 1912, one of the daughters of the complainant, Louisa Pickens, while visiting in Los Angeles, California, accidentally secured access to the correspondence between M. T. Campbell and the said Jeanette Fensky which disclosed a part of the truth relative to the estate of Ferdinand Fensky, deceased, and the dealings of the said Campbell and of the said Jeanette Fensky in reference thereto.

56. In not holding and decreeing that the deeds signed by Jeanette Fensky on or about September 18, 1907, were recorded a few days after her death, but were made and acknowledged several months before she died, and that until early in the year 1913, neither of the complainants nor the intervenor nor Charles Fensky, the father of the said intervenor, had any notice or knowledge that the said deeds were not delivered to the respective grantees during the lifetime of Jeanette Fensky.

57. In not holding and decreeing that during the pendency of the proceedings in the Probate Court of Shawnee County, Kansas, and during the pendency of the proceedings in the Superior Court of the State of California, in and for the County of Los Angeles, involving the administration of the estate of Ferdinand Fensky, deceased, and the administration of the estate

of Jeanette Fensky, deceased, none of the records or papers filed in either of the said estates disclosed the truth concerning the extent and value of the estate of Ferdinand Fensky, deceased, or the facts relating to the estate of Jeanette Fensky, deceased, that were secured by the discovery by the complainants of the correspondence between M. T. Campbell and the said Jeanette Fensky, and since the said discovery, and that the said facts aroused the suspicions of the complainants and caused them to use, and prior to the filing of the bill of complaint herein they did use, extraordinary efforts to learn the facts concerning the estate of the said Ferdinand Fensky, deceased, and concerning the estate of Jeanette Fensky, deceased, and the extent and value of each of the said estates.

58. In not holding and decreeing that each of the complainants, and Charles Fensky, the father of the intervenor herein, believed the statements contained in the inventories filed in the respective estates of Ferdinand Fensky, deceased, and Jeanette Fensky, deceased, in the Probate Court of Shawnee County, Kansas, and in the Superior Court of the State of California, in and for the County of Los Angeles, and believed the representations made to them by Jeanette Fensky and by M. T. Campbell and by the defendant, Merriam, and that except for such representations, the said complainants and the said Charles Fensky would not have released the estate of Ferdinand Fensky from their just claims and would not have made any assignment or quitclaim of any interest therein, but that the said complainants and the said Charles Fensky would have



enforced their respective claims against the said estate of Ferdinand Fensky, deceased, and against the estate of Jeanette Fensky, deceased.

59. In not holding and decreeing that subsequently to the recording of the deeds signed by Jeanette Fensky on or about the 18th day of September, 1907, to the defendants herein, the defendant, Eugene Wellke, conveyed to persons other than the defendants in this action the real property described as follows:

Lot 6 in Block A, New Fair Oaks Avenue Tract, Pasadena, California;

That portion of Lot "O" of the San Pasqual Tract in Pasadena, California, described as follows: Beginning at a point in the east line of Lot Four, distant one hundred thirty-two feet south from the northeast corner thereof; thence west parallel with the north line of said lot two hundred feet to the east line of Magnolia Avenue one hundred feet; thence east parallel with the north line of said lot two hundred feet to the east line thereof; thence along the last mentioned line one hundred feet to the place of beginning;

The portion of Lot 21 of A. F. Mill's Subdivision of the north half of Lot 6 of the Berry & Elliott Tract, in Pasadena, California, beginning at the northwest corner of said lot; thence east along the south side of Colorado Street 25 feet; thence south one hundred thirty-two and seventy-five hundredths feet to an alley; thence west 25 feet; thence north one hundred and thirty-two and seventy-five hundredths feet to the place of beginning, except a strip twelve and seventy-five

hundredths feet wide off the north side, now a part of Colorado Street;

Lot 24 of Mary H. Newton Tract, in Pasadena, California; and with the proceeds thereof purchased property known as No. 146 South Pasadena Avenue, and further described as Lot 60 of Baker's Subdivision, and also purchased property known as No. 726 Manzanito Avenue, in the City of Pasadena, and that the said Eugene Wellke is still the owner of the said two pieces of real property last mentioned.

60. In not holding and decreeing that with the money derived by Jeanette Fensky from the estate of Ferdinand Fensky, deceased, she purchased, and at the time of her death was the owner of the following described real estate in the County of San Bernardino, California, to wit: The East half of the Farm Lot 181 of Subdivision of lands belonging to Semi-Tropic Land and Water Company, as per map recorded in Book 6 of Maps, page 12, Records of San Bernardino County; that on or about September 18th, 1907, the said Jeanette Fensky, without any consideration therefor, signed a deed purporting to convey to the defendant, Alma J. Schmidt, the aforesaid real property; that the said deed was made without any consideration whatsoever and that the same was not delivered to the grantee therein named prior to the death of the said Jeanette Fensky; that the said Jeanette Fensky was the owner of the said real property at the time of her death and that the same was distributable among the heirs at law of Ferdinand Fensky; that the said facts were well known to the defendant, J. H. Merriam, at the time he filed

his inventory in the estate of Jeanette Fensky, deceased, and that the said Merriam omitted the said property from his inventory and accounts as administrator of the said estate of the said Jeanette Fensky, deceased.

61. In holding and decreeing that the controversy involved in this action depended upon the question whether or not M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, was actuated by a fraudulent purpose and intent when he conducted the probate proceedings in the said estate in Kansas and made his returns as administrator thereof.

62. In holding and decreeing that in all that Campbell had to do in the matter of purchasing the respective interests of the heirs at law of Ferdinand Fensky, deceased, the said Campbell was acting as the agent of Jeanette Fensky and was entitled to deal at arm's length with the said heirs at law whose interests he was seeking to purchase for the said Jeanette Fensky.

63. In not holding and decreeing that M. T. Campbell, while acting as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, had no right or authority to act as the personal agent or representative of any one of the heirs of the said decedent, adversely to, or as against the interest of any other heir of the said decedent.

64. In holding and decreeing that when M. T. Campbell dealt in his fiduciary capacity, he was at all times, or at any time, actuated by honest and bona fide motives.

65. In holding and decreeing that the contracts for the sale of real estate entered into by Ferdinand Fensky in his lifetime did not serve to operate as an equitable conversion of the titles to the respective properties so contracted to be conveyed, and that the said contracts did not serve, in any way, to convey the legal or equitable title to the real property therein described.

66. In holding and decreeing that any decision of the Supreme Court of Kansas having reference to the equitable conversion of real property into personal property by the execution of a contract of sale of real estate was controlling and binding upon the Federal Court.

67. In holding and decreeing that the Kansas Supreme Court has ruled, by consistent ruling, or otherwise, that where real property is sold under contract of sale, and notes for the purchase price are not given, and where time, either expressly or impliedly, is made of the essence of the contract, and where the right is given to the vendor, upon a default on the part of the vendee, immediately to declare a forfeiture and retake possession of the property agreed to be conveyed, there is no conveyance or equitable conversion of the legal title.

68. In holding and decreeing that by the decrees of the Probate Courts in Kansas and in California in the proceedings had in the estate of Ferdinand Fensky, deceased, in the said estates, the widow, Jeanette Fensky, became possessed of the right to the enjoyment of the estate of the said Ferdinand Fensky, in



any manner other than as provided by the laws of the said respective states.

69. In holding and decreeing that Jeanette Fensky, at any time, or for any reason, became or was entitled, equitably, or otherwise, to any interest in the estate of Ferdinand Fensky, deceased, or to any interest in any property owned by the said Ferdinand Fensky at the time of his death, except as provided by law.

70. In not holding and decreeing that M. T. Campbell, while acting as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, was the trustee of all the heirs at law of the said Ferdinand Fensky, deceased, and was acting in a fiduciary capacity.

71. In not holding and decreeing that Jeanette Fensky, while acting as administratrix of the estate of Ferdinand Fensky, deceased, in California, was the trustee of all the heirs at law of the said Ferdinand Fensky, deceased, and was acting in a fiduciary capacity.

72. In not holding and decreeing that the defendant, J. H. Merriam, while acting as administrator of the estate of Jeanette Fensky, deceased, in California, was the trustee of all the heirs at law of the said Jeanette Fensky, deceased, and was acting in a fiduciary capacity as to all persons having any interest in or claim upon or against the property of the said Jeanette Fensky or of Ferdinand Fensky, the deceased husband of the said Jeanette Fensky.

73. In not holding and decreeing that the defendant, J. H. Merriam, should be held to account, as admin-

istrator of the estate of Jeanette Fensky, deceased, for the property of the said estate which came into his hands or to his knowledge for which no account has been rendered.

74. In holding and decreeing that the settlement of the account of M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, was conclusive as to the complainants and the intervenor as to property omitted or withheld from the account, either fraudulently or accidentally.

75. In holding and decreeing that the settlement of the account of Jeanette Fensky, as administratrix of the estate of Ferdinand Fensky, deceased, in California, was conclusive as to the complainants and the intervenor as to property omitted or withheld from the account, either fraudulently or accidentally.

76. In holding and decreeing that the settlement of the account of J. H. Merriam, as administrator of the estate of Jeanette Fensky, deceased, in California, was conclusive as to the complainants and the intervenor as to property omitted or withheld from the account, either fraudulently or accidentally.

77. In not holding and decreeing that the releases and quitclaims executed by the complainants and by Charles Fensky, the father of the intervenor, were fraudulent and void and of no effect, and that the same did not estop the said complainants or the said Charles Fensky or the said intervenor from claiming their respective shares of the estate of Ferdinand Fensky, deceased.

78. In holding and decreeing that the complainants and the intervenor are bound or concluded by the decrees of distribution in the estate of Ferdinand Fensky, deceased, or by either of them.

79. In holding and decreeing that the complainants and the intervenor are bound or concluded by the decrees of distribution in the estate of Jeanette Fensky, deceased, or by either of them.

80. In holding and decreeing that the decree of distribution in the estate of Jeanette Fensky, deceased, was or is valid.

81. In holding and decreeing that due and legal notice was given of the hearing of the petition for distribution in the estate of Jeanette Fensky, deceased.

82. In holding and decreeing that due and legal notice was given of the hearing of the supplemental petition for distribution in the estate of Jeanette Fensky, deceased.

83. In admitting in evidence the judgment roll in the case entitled *Pickens v. Campbell*, in the District Court of Shawnee County, Kansas.

84. In holding and decreeing that the complainants are bound or concluded in this action by the judgment rendered and entered in the case entitled *Pickens v. Campbell*, in the District Court of Shawnee County, Kansas.

85. In holding and decreeing that the Federal Court is bound or concluded by the decision of the Supreme Court of Kansas in the case entitled *Pickens v. Campbell*.

86. In holding and decreeing that the complainants are bound or concluded in this action by the decision

of the Supreme Court of Kansas in the case entitled *Pickens v. Campbell*.

WHEREFORE, the said complainants and the said intervenor pray that the said decree be reversed and that an order and decree reversing the said decree be ordered and entered, and for such other and further order and decree as may be meet and equitable, and for costs.

Emmet H. Wilson

Solicitor for Complainants and  
Intervenor, Appellants.

Endorsed: Receipt of a copy of the within is hereby admitted this 6th day of August, 1920. J. H. Merriam, Hunsaker, Britt & Cosgrove, Attorneys for Defendants.

Filed Aug 6 1920 Chas. N. Williams, Clerk By  
R. S. Zimmerman, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

PETITION FOR ALLOWANCE OF APPEAL.

TO THE HONORABLE DISTRICT COURT OF  
THE UNITED STATES, FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVI-  
SION:

The above named complainants and the above named intervenor, considering themselves aggrieved by the judgment and decree made and entered in the said cause on the 15th day of April, 1920, whereby it was ordered, adjudged and decreed that the bill of complaint in the said cause be and the same was dis-



missed, hereby appeal from the said judgment and decree, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified and set forth in their assignment of errors filed herewith, and the said complainants and the said intervenor pray that their appeal may be allowed, that a citation issue as provided by law, that a transcript of the record, testimony, stipulations, proceedings, documents, papers and exhibits upon which the said judgment and decree was based, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Judicial Circuit, sitting at San Francisco, California, under the statutes and the rules of the said court in such cases made and provided.

And your petitioners, the said complainants and the said intervenor, further pray that this Honorable Court make and enter the proper order allowing such appeal and fixing the amount of the security, if any, to be required of them to bring and to perfect their said appeal.

EMMET H. WILSON,  
Solicitor for Complainants and for Intervenor.

#### ORDER ALLOWING APPEAL.

The foregoing petition for appeal having been presented to the Court and having been by the said Court duly considered, it is hereby ordered that the said petition be and the same is hereby granted, and that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree heretofore filed and entered herein be and the

same is hereby allowed, and the bond on appeal to be given on behalf of the appellants is hereby fixed at the sum of two hundred fifty (\$250.00) dollars, to be conditioned according to law. It is further ordered that a certified transcript of the record, testimony, stipulations, proceedings, documents, papers and exhibits be forthwith transmitted to the said United States Circuit Court of Appeals.

DATED this 6th day of August, 1920.

Ross

Circuit Judge.

Endorsed: Receipt of a copy of the within is hereby admitted this 6th day of August, 1920. J. H. Merriam, Hunsaker, Britt & Cosgrove, Attorneys for Defendants.

Filed Aug 6 1920 Chas. N. Williams, Clerk By  
R. S. Zimmerman Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, is held and firmly bound unto J. H. Merriam, Eugene Wellke, Alma J. Schmidt and Minnie S. Farnsworth, defendants in the above entitled action, in the sum of two hundred fifty dollars (\$250.00), lawful money of the United States, to be paid to them

and their respective heirs, executors and administrators, to which payment, well and truly to be made, the said corporation acknowledges itself firmly bound by these presents.

Signed, sealed and dated this 6th day of August, 1920.

THE CONDITION of the foregoing obligation is such that

WHEREAS, the above named complainants and intervenor, Louisa Pickens, Johanna Schutt and Charles F. Fensky, have taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and decree in the above entitled cause made and entered by the District Court of the United States, Southern District of California, Southern Division, on the 15th day of April, 1920;

NOW THEREFORE, if the above named complainants and intervenor, Louisa Pickens, Johanna Schutt and Charles F. Fensky, shall prosecute the said appeal to effect and answer all costs and damages if they shall fail to make good their said appeal or plea, then this obligation shall be void; otherwise to remain in full force and effect.

(Corporate Seal)

NATIONAL SURETY COMPANY,

By Catesby C. Thom

Its Attorney in Fact.

STATE OF CALIFORNIA, )

: ss.

County of Los Angeles. )

On this 6th day of August in the year one thousand nine hundred and twenty, before me William M. Cur-

ran, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Catesby C. Thom, known to me to be the duly authorized Attorney in Fact of NATIONAL SURETY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney in Fact of said Company, and the said Catesby C. Thom, acknowledged to me that he subscribed the name of NATIONAL SURETY COMPANY thereto as principal, and his own name as Attorney in Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

(Notarial Seal)      WILLIAM M. CURRAN  
Notary Public in and for Los Angeles  
County, State of California.

The premium charged for this bond is Ten Dollars per annum.

The within bond is hereby approved.

Ross  
Circuit Judge

Endorsed: Filed Aug 6 1920 Chas. N. Williams.  
Clerk by R. S. Zimmerman, Deputy Clerk



No. B-15 – EQUITY.

IN THE DISTRICT COURT OF THE UNITED  
STATES, IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA,  
SOUTHERN DIVISION.

LOUISA PICKENS and JO-	)	
HANNA SCHUTT,	)	
	)	
Complainants,	)	
	)	
CHARLES F. FENSKY,	)	
	)	
Intervenor and Complainant,	)	CONDENSED
	)	STATEMENT
-vs-	)	OF THE
	)	EVIDENCE.
J. H. MERRIAM, EUGENE	)	
WELLKE, ALMA J. SCHMIDT,	)	
AMANDA KATZUNG, MIN-	)	
NIE S. FARNSWORTH, COR-	)	
RINE LOVELAND and DON	)	
FERGUSON,	)	
Defendants.	)	

The following comprises a statement of the evidence introduced at the trial of the above entitled case essential to the decision of the questions presented by the appeal.

J. O. HEINLEY,

a witness called on behalf of the plaintiffs, testified as follows:

DIRECT EXAMINATION.

I am assistant cashier of the State Bank of San Pedro. I have a statement of the account of Ferdinand Fensky in that bank from April 1, 1903, until

(Testimony of J. O. Heinley.)

the account was closed, July 22, 1903, showing the deposits to and checks against that account. Our records are incomplete and I was unable to get anything back of April 1, 1903.

The statement was offered and received in evidence as Plaintiffs' Exhibit 1. The said exhibit shows the account of Ferdinand Fensky in the State Bank of San Pedro, and shows the following:

April 1, 1903, Balance,      \$1,585.65

May 9, 1903, Deposit,      2,000.00

The said exhibit also shows the withdrawal of various amounts from April 3, 1903, to July 22, 1903. Upon the date last mentioned the account was closed by the withdrawal of \$963.60.

#### CROSS EXAMINATION.

Our books do not show the name nor the terms upon which the account was originally opened. This account is simply an open checking account. This is the only account that we can find in the name of Ferdinand Fensky. The account existed prior to the date shown on said statement. I am unable to obtain any signature cards given to the bank at the time said account was originally opened. The bank moved into new quarters in 1913, and it appears that the old records were boxed up and filed away in an old vault and I was unable to locate the original deposit slips or the signature cards. I could not say whether the signature cards contained any terms of deposit. I don't know anything about the terms. I was not in the bank at that time. I do not know by whom the

(Testimony of J. O. Heinley.)

original account was opened up. This account is shown to have been closed July 22, 1903. It does not show in what manner it was closed.

Re Direct Examination.

The checks Mr. Wilson shows me indicate that Mrs. Fensky did have an account in the said bank in 1904.

Re Cross Examination.

The word "checks" does not appear on our books. That was added in by me of my own accord. The word "deposits" does not appear on the books. There is nothing to indicate. It is credit and debit, is what it is. The last item \$963.60 represents the total amount drawn out on that given day. I am not in a position to state how the bookkeepers at that time entered it. My connection with the bank commenced in 1912. I have been speaking exclusively as to my deductions, respecting the records of the bank at this date in 1903.

GUY H. WOOD,

a witness called on behalf of the plaintiffs, testified as follows:

DIRECT EXAMINATION.

I am assistant treasurer of First Trust and Savings Bank of Pasadena. I have a pass book and signature card and receipt in connection with the account in Pasadena Savings and Trust Company of Mrs. Jeanette Fensky or Mr. F. Fensky. The name of Pasadena Savings and Trust Company was changed to First Trust and Savings Bank.

(Testimony of Guy H. Wood.)

The same were offered and received in evidence as Plaintiffs' Exhibits 2, 3 and 4, respectively.

The pass book, Plaintiffs' Exhibit 2, shows the account of "Mrs. Jeanette Fensky or Mr. F. Fensky", and shows the following credits:

August	1, 1903	\$500.00
January	1, 1904, Interest	8.33
February	26, 1904, Deposit	491.67
July	1, 1904, Deposit	16.70

---

TOTAL     \$1,016.70

and shows the withdrawal of the total account September 28, 1904.

The signature card, Plaintiffs' Exhibit 3, is in the name of "Mrs. Jeanette Fensky or Mr. F. Fensky", dated August 1, 1903. The same contains the signature of Jeanette Fensky only, and her address, San Pedro.

Plaintiffs' Exhibit 4, a receipt, dated Pasadena, Cal., September 28, 1904, for \$1016.70, signed "Jeanette Fensky" and stamped "Paid Sep. 28, 1904, Pasadena Savings and Trust Co., Pasadena, Cal."

Cross Examination.

We have no other signature card in connection with the account, and no record in the bank showing the connection of F. Fensky with this account, other than as appears on the pass book. I assume that Mrs. Jeanette Fensky made the initial deposit from the fact that her signature was left at the time.



(Testimony of Theodore W. Smith.)

THEODORE W. SMITH,

a witness called on behalf of the plaintiffs, testified as follows:

DIRECT EXAMINATION.

I am cashier of First National Bank of Pasadena. I have the records of the accounts of F. Fensky and Jeanette Fensky in that bank. That is an exact copy of the accounts as they appear in the old ledger.

The same was offered and received in evidence as Plaintiffs' Exhibit 5, and is as follows:

		B -11	7 5 5
		Jeanette Fensky	
9-28-04	200	1016.70	816.70
		Huite	22.99
10-14	1050	300	
17	89.69		000
		F. Fensky	
6-19-03		72	
8 - 1	72		00

Three signature cards were offered and received in evidence as Plaintiffs' Exhibits 6, 6-a and 6-b as follows:

Exhibit 6.

Authorized Signatures for

F. Fensky

The First National Bank, Pasadena, California

Sig. F. Fensky.

Address Altadena

(Testimony of Theodore W. Smith.)

if anything should happen to me pay to my wife  
Jeanette Fensky

Date July - 6 03 not identified

Exhibit 6-a.

Authorized signatures for F. Fensky & Jeanette Fensky  
The First National Bank, Pasadena, California

Sig. F. Fensky and Jeanette Fensky (his wife)

Address Altadena,

Wife of F. Fensky.

Date July 7, 03.

Exhibit 6-b.

Authorized signatures for Mrs. Jeanette Fensky, The  
First National Bank, Pasadena, California. Sig. Jeanette Fensky.

Address ~~San Pedro Cal.~~ P. O. Box ~~1804~~

Reopened 8/23/06. Introduced by Don Ferguson.

Date Sept. 28/04

(Witness continuing): I have also the original ledger entry of the account of Mrs. Jeanette Fensky which was reopened August 23, 1906.

Questioned by defendants attorneys the witness stated that the signature card, exhibit 6, undoubtedly refers to the account shown in exhibit 5 in the name of F. Fensky, showing the account opened June 19, 1903, by a deposit of \$72.00 and closed August 1, 1903 by the withdrawal of \$72.00 and that is the total transaction in said bank by Ferdinand Fensky, in connection with that account. That signature card, exhibit 6, is the only signature card for F. Fensky alone, but that

(Testimony of Theodore W. Smith.)

card has a notation and the other signature card (Exhibit 6A) undoubtedly we surmise was left the next day to cover the notation made on the first card that this should be a joint account. The card marked Jeanette Fensky (Exhibit 6B) refers to the account appearing on exhibit 5 under the name of Jeanette Fensky. It was undoubtedly signed September 28, 1904. At the time said card for the joint account was signed, the bank required nothing else than such a signature card to be signed by the depositor, making it a joint account.

Same was offered and received in evidence as Plaintiffs' Exhibit 7, as follows:

First National Bank, Pasadena, Cal.

Name Mrs. Jeanette Fensky.

Date	Checks	Deposits	Balance
Transfer from Bl, 1906			
8/23	275	2500.	2500.
9/ 6	1200		2225
11/23	1025		1025
/26			000
8/ 6 1907		640.18	640.18
6/26 1908	320		320.18
7/ 9	320		.18
27 s/a	18		000



(Testimony of Theodore W. Smith.)

The plaintiffs offered in evidence the following signature card which was received in evidence as Plaintiffs' Exhibit 8, as follows:

Authorized Signatures for

Jeanette Fensky

The First National Bank, Pasadena, California.

Mrs. Jeanette Fensky will sign No. 581-N. Raymond

Mrs. Amanda Katzung No. 450 - Lincoln Ave.

Mr. Alma J. Schmidt will sign No. 809-Locust St.

Date Oct. 11, 1907

Introduced by————

There is nothing on said signature card (exhibit 8) that would show whether Amanda Katzung or Alma J. Schmidt would be authorized to withdraw money from that account.

A. B. PALMER,

a witness called on behalf of the plaintiffs, testified as follows:

I am connected with the National Bank of Pasadena which is the successor of the Pasadena National Bank. I herewith produce a transcript of the ledger account of F. Fensky or Jeanette Fensky from July 16, 1903, to July 6, 1908, at which time the account was closed. It shows that the account was opened with the two names. It was closed August 1, 1903, and reopened February 26, 1904. I produce also two signature cards, one with the signature "F. Fensky," the other "Jeanette Fensky." Both dated July 17, 1903. The account was opened July 16, 1903.

(Testimony of A. B. Palmer.)

The cards were offered and received in evidence as Plaintiffs' Exhibits 9 and 9-a.

Plaintiffs' Exhibit 9 contains the signature of "F Fensky." Plaintiffs' Exhibit 9-a contains the signature of "Jeanette Fensky." Both cards are dated July 17, 1903.

(Witness continuing): I produce also a certificate of deposit, dated July 17, 1903.

The same was offered and received in evidence as Plaintiffs' Exhibit 10, as follows:

Certificate

of PASADENA NATIONAL BANK No. 6858  
Deposit

Pasadena, Cal. Jul. 17, 1903, \$800.00  
F. or Jeanette Fensky has deposited in this Bank  
Eight hundred & 00/100.....Dollars  
payable to the order of either on the return of this  
Certificate properly endorsed.

H. Newby.

Not subject to check.

Cashier.

This Certificate bears 4 per cent interest  
per annum from date if left 6 months.

The same is endorsed on the back "Jeanette Fensky."  
The same is perforated "Paid" and is stamped with  
rubber stamp on the face of the certificate of deposit  
"Feb 26 1904."

(Witness continuing): I now produce the account  
in Pasadena National Bank of F. or Jeanette Fensky  
and the account of Minnie S. W. Farnsworth, special,

(Testimony of A. B. Palmer.)

and the account of the estate of Jeanette Fensky, which are correct copies of the bank ledger.

The same was offered and received in evidence as Plaintiffs' Exhibit 12. It is in part as follows:

1903	CHECKS	DEPOSITS
July 16	\$ 128.00	\$ 163.60
Aug. 1	35.60	
Account closed Aug. 1, 1903.		
1904		
Feb. 26		900.00
Sept. 13		1,000.00
Sept. 24	\$1,900.00	
Account closed Sept. 24, 1904.		

The exhibit shows deposits and withdrawals from January 3, 1905, to October 14, 1907, after which appears the following heading: "F. or Jeanette Fensky or by Minnie S. W. Farnsworth, Oct. 15, 1907." Then follow deposits and withdrawals to July 6, 1908, on which date the account was closed by the withdrawal of the sum of \$2,819.73. Total deposits and withdrawals from January 3, 1905 to July 6, 1908, \$78,374.95. Then follows the heading "Minnie S. W. Farnsworth, special", followed by deposit of \$2,819.73, July 6, 1908; then follow deposits and withdrawals to September 17, 1908, on which date the account was closed. Same shows withdrawal on July 21, 1908, of \$125.00 and \$2,324.38, respectively. The exhibit also shows the opening of an account, "Estate of Jeanette Fensky, J. H. Merriam Adm." opened by a deposit July 21, 1908, of the sum of \$2,324.38.

(Testimony of A. B. Palmer.)

(Witness continuing): I produce also deposit slip of Pasadena National Bank dated January 3, 1905.

Same was offered and received in evidence as Plaintiffs' Exhibit 13, as follows:

Deposited with the Pasadena National Bank

Pasadena, Cal. Jan. 3-1905

F. or J. Fensky

	Dollars	Cents
Check Kan.	1000	
	1000	
	<hr/>	
	2000	

(Witness continuing): I produce also deposit slip showing a deposit to the account of "Minnie S. W. Farnsworth, Special", July 6, 1908, \$2,819.73.

I produce also deposit slip showing deposit to the account of, "Estate of Jeanette Fensky," July 20, 1908, \$2324.38.

The same were offered and received in evidence as Plaintiffs' Exhibits 14 and 15, respectively.

(Witness continuing): I produce also signature card of Jeanette Fensky or / and Minnie S. W. Farnsworth, dated October 11, 1907.

The same was offered and received in evidence as Plaintiffs' Exhibit 16, as follows:

Authorized Signatures for

Jeanette Fensky or / and Minnie S. W. Farnsworth

Pasadena National Bank, Pasadena, California

Mrs. Jeanette Fensky will sign Jeanette Fensky



(Testimony of A. B. Palmer.)

Dead                      No. 581 – N. Raymond Ave  
July 15" 08

~~Mr.~~ Minnie S. W. Farnsworth will sign Minnie S.  
W. Farnsworth

No. 581 – N. Raymond Ave

Date Oct. 11th 1907 Introduced by

CROSS EXAMINATION.

There was no money in the account between August 1, 1903, and the next date appearing on the account, to wit: February 26, 1904.

The largest balance appearing in the account prior to July 8, 1908, was \$9,000. The account which was opened up by F. or Jeanette Fensky in July, 1903, was closed August 1, 1903, and remained closed until February 26, 1904. It was next closed July 6, 1908. At the time the account was closed August 1, 1903, the balance was \$35.60. When it was closed September 24, 1904, one check of \$1,900.00 covered the whole deposit. When the account was closed July 6, 1908, there was \$2,819.73 in the account.

Deposition of

W. C. STEIN,

taken in Topeka, Kansas, on behalf of the plaintiffs,  
was read in evidence as follows:

DIRECT EXAMINATION

I reside in Topeka, Kansas. I was acquainted with Ferdinand Fensky in his lifetime. I knew him from 1879 or 1880 until his death. At the time of his death I owed him \$2400 on account of two notes. I paid the

(Testimony of W. C. Stein.)

notes afterwards and they were returned to me. I have been unable to find them. I paid the entire \$2400 to Mrs. Fensky after Mr. Fensky's death.

I paid a part of the money and made a new note for \$600.00 to Mrs. Fensky. The last note was paid to Mr. Merriam after Mrs. Fensky's death. I sent a draft to Mr. Merriam in California by Mr. Campbell. That was some time after Mrs. Fensky's death. I now produce the note.

The said note was read in evidence as follows:

\$600.00                      Topeka Kan. January 15th, 1908.

One year after date we promise to pay to the order of Mrs. F. Fensky.....

Six Hundred (\$600.00).....Dollars, at the rate of five per cent per annum. Value Received, and we will pay said interest semiannually.

W. C. Stein

Anna Stein

No. \_\_\_\_\_

Due \_\_\_\_\_

(Endorsement across face of note as follows)

Paid and cancelled, August 8, 1908.

J. H. Merriam, Atty. Holder.

(Witness continuing): That was the last of the \$2400.00. The other \$1800 was paid directly to Mrs. Fensky. I now produce the original note for \$2400.00, dated July 15, 1903.

The said note was read in evidence as follows:

\$2400.00                      Topeka, Kan., July 15th, 1903.

Three years after date we promise to pay to the order of Jenny Fensky, Two thousand and four hun-

dred No – 100 Dollars at the rate of five per cent per annum for value received, said interest to be paid semiannually.

W. C. Stein,  
Anna Stein.

No.—— Due——

Paid Jan. 15th, 1908.

Endorsed across the face, "Paid in full."

(Witness continuing): I have looked for a letter addressed to Mr. and Mrs. W. C. Stein, dated at San Pedro, California, September 15, 1903, and signed Mrs. F. Fensky. I have not been able to find it. I received such a letter on the date that I mention of which this letter I now have purports to be a copy. I think it is in Mrs. Farnsworth's handwriting. She was a niece to Mrs. Fensky and lived with her. I think it is a true copy of the letter I received. I couldn't say word for word, but I received a letter something along this line.

The letter was read in evidence as follows:

San Pedro-Calif. Sept. 15-  
1903-

and Mrs.  
Mr. W. C. Stein

Topeka Kansas-

Dear Friends: Rec'd your very kind letter of condolance also the little article in the journal.

Prehaps you will be surprised to hear from me just at this time—I feel you are deep and sincere friends and you sympathize with me greatly in in my very great sorrow namely the passing away of my very

dear, ~~and~~ good and loving husband Ferdinand Fensky. Words cannot express my grief during this siege. Lonesome is a very mild expression and every where I turn around I miss him – miss him – miss him – constantly miss him – life to me now is so very different.

I will now ask a favor of you dear friends ~~I will first explain~~ and that is will you make a new note -- make it all in one & in my name date ~~your note~~ it back to July 15th & have the interest five per cent? If you feel satisfied and pleased to do me this favor I will certainly appreciate your kindness as I will in that case not have to enter it into Court as it will be in my name -- set your own time for it to run -- I am fairly well -- am not alone have some of the relatives with me all the time -- My oldest sister is with me, also my brother of Topeka is with me. Minnie is also here & Corrine is here. Laura Coughlin & husband are also here from Topeka -- they leave for home Thur. next.

In regard to the Note, keep it to yourselves, and if you don't feel fully prepared to obligate yourselves ~~in~~ it will be all right with me too.

Trusting you are all prosperous & happy.

I remain your sincere friend

Fred

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Mrs. ~~Jennie~~ Fensky by

CDW.

Minnie

(Witness continuing): I think I received an original letter, of which the letter you now show me is a copy, dated box 1804, San Pedro, California, September 23, 1903. I received it from Mrs. Fensky written by Mrs.



Farnsworth, I think. I have been unable to find the original letter.

The letter was read in evidence as follows:

Box 1804 – San Pedro, Calif., Sept. 23, 1903.  
Mr. & Mrs. W. C. Stein, Topeka, Kansas.

Dear Friends:

Your very, very kind ~~and considerate~~ letter received this A.M. & will endeavor to answer it immediately. Thank you ever so much for the favor you have bestowed upon me – A friend in need is a friend indeed, is the old addage, and very true, you are in this case. Within you will find the two old notes which I send you. And any time you care to pay off the principal on new note it will be all right with me. ~~with a month or two notice~~ I am only fairly well as my heart and stomach bother me. We are having some cooler weather.

Trusting all are well and prospering, I Remain  
P-14 Truly Yours  
CDW. Mrs. F. Fensky.

(Witness continuing): When Mr. Fensky died I owed him \$2400.00 in the form of two notes. One for \$2,000, and one for \$400. Later these were cancelled and I made a new note for \$2400. Mrs. Fensky asked me by a letter to make this change. She was known both as Jennie and Jeanette Fensky.

#### CROSS EXAMINATION

I never saw Mrs. Fensky after she moved from Topeka to California. All my transactions with her

were thru the mail. I had no information as to who was the owner of those notes at the time of Mr. Fensky's death. The draft that I sent to California was payable to Mr. Merriam. He was the administrator.

W. C. STEIN recalled made the following statement:

WITNESS: I want to make a correction in my testimony given Saturday. I stated Mrs. Fensky dictated in her letter what date I should date that note, but I want to say now I don't know anything about it.

#### REDIRECT EXAMINATION

I was on my way to the postoffice to send a draft when I met Mr. Campbell. He told me of the death of Mrs. Fensky. The draft was made out to Mrs. Fensky. I didn't send the draft then for quite a while, I think it was almost a month before I could write back and forth and know where and to whom to send it. I wrote to Mrs. Farnsworth to find out from her to whom I was to send it.

Deposition of

OSCAR L. KRAUSS,

taken in Topeka, Kansas, on behalf of the plaintiffs,  
was read in evidence as follows:

#### DIRECT EXAMINATION

I reside in Topeka, Kansas. I am acquainted with Louisa Pickens and Johanna Schutt. They are sisters of my wife. Mrs. Pickens resides, and has resided continuously in Topeka since 1875 or 1876. Mrs. Schutt resides and has resided in Omaha, Nebraska,

since 1876. They were sisters to Ferdinand Fensky. I knew him since 1869. His brothers were Hermann Fensky, Frederick Fensky and Charles Fensky. His sisters were Johanna Schutt, Ida Wendt, Hulda Richter and my wife, Augusta Krauss. At the time of Ferdinand Fensky's death, Hermann Fensky was dead. The other brothers and sisters were living. George Fensky was Hermann's son. Since Ferdinand Fensky's death his brother Charles died leaving one son also named Charles, who has been living in Missouri since 1908. Mrs. Wendt died a couple of years after Ferdinand died. She died in Germany, leaving one son named Conrad. He died about two years after his mother's death. Conrad Wendt's estate was distributed by the court in Germany. I attended to the correspondence. His heirs each received an equal share of his estate. Hulda Richter died about two years ago.

I recall the death of Ferdinand Fensky in August, 1903, and that M. T. Campbell was appointed administrator of his estate. In the fall after the death of Ferdinand Fensky, I had an interview with Mr. Campbell in which he made a statement to me as to the assets of the Ferdinand Fensky estate. Mr. Campbell came to my store to see me. We talked about the value of the estate, and he gave me a statement of the assets. He explained that it was a statement of all the assets concerning the heirs in Kansas. He left a written statement with me and said that it showed all of the assets of the Ferdinand Fensky estate in Kansas. I kept the statement until the trial of the case of Pickens

vs. Campbell. The paper you now show me is the statement referred to. That statement handed to me by Mr. Campbell purported to give an appraised valuation of the real and personal property of Ferdinand Fensky in California. The statement itself told about the value of the estate in Shawnee County. He stated that the amount set out in the statement, if it was collectable, would be all that would come to the heirs in Kansas. He said these amounts would have to be collected before we could share in it. I looked it over and said that some of the accounts might be rather doubtful, and my experience was that a man could never collect the face value of any statement. Later on he came to my place of business and made an offer of \$1,000. to each one of the heirs. He made the offer to me as the husband of Augusta Krauss, one of the heirs. Later, about one-half or three-quarters of a year after Ferdinand died, he asked me to talk to the other heirs. He indicated to me that it would cut the matter short instead of keeping it in the probate court for years, and the expenses of the court, and so forth, and he thought it better to have a thousand dollars than a little later to get a little more. In this last conversation we talked about the statement he had previously given me. Mr. Campbell asked me to write to Mrs. Wendt. He wrote to her in English and asked me to translate his letter into German between the lines which I did. He made the same offer to Mrs. Wendt that he made to us. I think he mailed the letter. He just offered a thousand dollars.



I had another conversation with Mr. Campbell about the real estate here and he said that had nothing to do with us, we were not sharing in that.

Q. Did Campbell ever mention to you anything about the contracts of sale of real estate in Fensky's addition and elsewhere?

A. He said to me those transactions in the so-called Fensky addition were all real estate and that we had nothing to do with that.

Q. That the heirs had nothing to do with that?

A. Yes, the heirs here in Kansas.

Q. Did Mr. Campbell in any conversation with you say anything about what interest the brothers and sisters of Ferdinand Fensky had in the contracts for sale of lots in the Fensky addition?

A. He told me we had nothing to do with those affairs in the addition.

(Witness continuing): The heirs subsequently sold their interest in the estate to Mrs. Fensky. Mrs. Krauss and Mrs. Pickens sold their interests for \$1,000. each. Mrs. Wendt, of Germany, on receiving this offer, I understood, had an inquiry made through the American consul and finally accepted the thousand dollars, so I understood.

The statement referred to in the foregoing testimony of Oscar Krauss was read in evidence and is as follows:

P-39

C. D. W

Appraised Valuation of Personal Property in Shawnee County Kansas.

Mortgage Note	Mallice on Lot #88	Kansas Ave. Topeka	\$1500.00
"	Rigdon	N. Topeka	30.50
Unsecured	Emilie & Jacob Bausch	County	200.00
"	Lukens	"	1000.00
Mortgage	Dr. Mitchell	N. Topeka	2000.00
"	Burchner Brothers	"	1500.00
Unsecured	W. C. Stadel	County	100.00
"	W. C. Stadel	"	250.00
Mortgage	Mary & J. W. Stump	N. Topeka	100.00
"	Alonso Wardell	County	1350.00
"	Francis Tuttle	"	2500.00
"	Jacob Petrie	Topeka	400.00
"	John Carter	County	1500.00
"	Joseph & Lizzie Bausch,	"	
	not recorded		
Unsecured	J. H. Fought	N. Topeka	300.00
Mortgage	Amos Hutchinson	"	800.00
"	John Sheetz	N. Topeka	550.00
Unsecured	E. D. Jones	"	400.00
"	Frank Root	N. Topeka	100.00
Mortgage	Joseph & Lizzie Bausch	County	500.00
"	Paul Hanschild	Topeka	700.00
"	George Stoker, endorsed		150.00
Endorsed			

	700.00
	79.00
	&
Total. . . .	<u>\$16709.50</u>

by his parents  
 Louise Pickens, Balance

“  
 “

Appraised Valuation of Real & Personal Property  
in California.

1	Lot in Suburbs of Los Angeles	\$ 600.00
11	“ “ Outskirts of San Pedro	600.00
20	Acres in Orange County, poor quality	600.00
60	“ in “ “ sand and sage Ranch	1400.00
	Note F. C. Richter	400.00
	Household goods	100.00
		<hr/>
		\$3700.00

Cash in hands of Att'y M. T. Camp-  
bell, Topeka at time of death 4297.14

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\$24706.64

Allowed by court to the widow.

1. The Homestead at San Pedro, Cal.
2. Household Goods.
3. \$50.00 per month during term of administration  
3 years.

All Property is subject to Costs, Taxes etc. arising.

(Witness continuing): I do not know of any separate estate that Jeanette Fensky owned prior to the death of Ferdinand Fensky. When Mr. Campbell was talking with me about the assignment and the interest of Mrs. Krauss or the other heirs in this estate I did not know that W. C. Stein owed the estate several hundred dollars. He never mentioned that and it does not appear in the statement. I did not know it independent of the statement. I did not know that Frank Simms owed the estate. I did not know that a man named Kimmerle owed a note to the estate. I did not



know that at the time of the death of Ferdinand Fensky he had money in the bank. I did not know during any of the conversations that I had with Campbell relative to the sale of the interests of the heirs in the Fensky estate that he was acting as agent and attorney for Mrs. Fensky.

I finally advised my wife to assign her interest in the estate. I would not have done so if I had known that the statement Mr. Campbell handed me did not contain a true and correct statement of the assets of Ferdinand Fensky estate. At the time I advised Mrs. Krauss to assign her interest in the estate for \$1,000 I took that statement as coming from the Probate Court and took it as being correct and made my figures on it. During all of the negotiations leading up to the assignment and at the time of the assignment I believed that the statement furnished to me by Mr. Campbell was a true and correct statement of the assets of the Ferdinand Fensky estate. I don't think I would have advised my wife and the other heirs to have assigned their interest if I had known that the statement was not true and correct.

Prior to that transaction I had known Mr. Campbell a good many years. He had been my counsel or advisor in real estate deals, made the deeds and so forth.

I wrote a letter to Mrs. Schutt that we concluded to take \$1,000. Nobody prompted me to write her. I believe at that time I notified her to accept it so as to expedite the matter, as if we accepted \$1,000 it was only a matter of time we gained by it. Mr. Campbell did not suggest that I write.

## CROSS EXAMINATION

I remember the flood in 1903, property in North Topeka was worth a great deal less after the flood. Most of the mortgages described in this statement are upon property in North Topeka. I know that some of the men whose names appear here were not very good pay and especially after 1903. That flood depreciated property along the low lands in and around Topeka, and it is so today. I sold my old home over there we figured being worth \$2500 for \$850. I would not have wanted to discount Mr. Foucht's note for \$800 at that time.

Q. Well, as a matter of fact, nearly all of these propieties named here where the appraised value is given the property was very much depreciated at the time of the flood of 1903?

A. I wouldn't have bought the notes for fifty cents on the dollar at the time of the flood in 1903.

(Witness continuing): I remember when Mr. Fensky laid out Fensky addition. The sale of the lots was advertised in a public way in the newspapers and otherwise, and there was a big sign over the north end of the bridge indicating that the lots in Fensky addition were for sale. That was his home place and was on a public thoroughfare. I don't know practically anything about his selling those lands on contract. He didn't talk much about his business. I never questioned him and took no interest in it. I never saw that addition or knew exactly where it was until years after Ferdinand died. That addition is a good ways off from the business part of town. According to my

estimate the flood couldn't have had very much effect on that particular district because the flood did not run over that way.

I had know Mr. Campbell for a good many years. I knew he was a practicing lawyer and was among the early lawyers here. He had transacted business for me once in a while. I know he enjoyed a very good reputation. He never mentioned contracts and I never knew anything about the contracts until the litigation here. He just talked about the addition and claimed that it was all real estate and under the law of California would not be participated in by the heirs here in Kansas, that is the way he explained it to me. He said the addition down there went to Mrs. Fensky and he as administrator hadn't anything to do with it. Mr. Campbell came to see me about this statement in the fall or early winter of 1903, probably six or eight months after the flood.

Ferdinand Fensky superintended the building of the houses on that addition. He made the plans and built them. He was an expert carpenter. I don't know how he sold them. I never had anything to do with his personal affairs.

I knew Frederick Fensky who lived at Leavenworth. I knew about his coming over here and making an investigation after we made a compromise. He was the last one of the Fensky heirs that settled.

After he made an investigation he accepted either eleven hundred or twelve hundred dollars in settlement. I saw him several times after he had accepted his money. He made a remark about a discrepancy in the

statement I got from Mr. Campbell and the one he had. The names of Stein and Kimmerle were left off I believe.

During all this time Mrs. Pickens lived here in the city. Before Ferdinand moved away they and Mrs. Pickens visited back and forth.

#### REDIRECT EXAMINATION.

Before Mrs. Wendt accepted her part of the money she had some conference through the Consulate. She accepted the \$1000 after she had investigation made through the consul, Mr. Oscar Bischoff. The way I had it came through him.

I have no personal knowledge of the investigation made by the American consul. All I know is what I heard from somebody else.

Deposition of

AUGUSTA KRAUSS,

taken in Topeka, Kansas, on behalf of the plaintiffs, was read in evidence as follows:

#### DIRECT EXAMINATION

I am the wife of Oscar Krauss and a sister of Ferdinand Fensky. Louisa Pickens and Johanna Schutt are my sisters. I signed a paper whereby I received a thousand dollars and turned over my interest in the Ferdinand Fensky estate to Jeanette Fensky. I talked with my husband about it and not with anyone else. He transacted all of my business for me.

I took his word; I thought everything was all right. My husband told me he didn't see any other way than to accept it. I relied on what he told me.



I never heard of Mrs. Jeanette Fensky owning any property in her own right independent of what Mr. Fensky owned during his lifetime. I wasn't very much acquainted. I did not visit back and forth with them very much.

#### CROSS EXAMINATION.

My home has been in Topeka for a good many years. My husband has been a business man here since 1869. I was well acquainted with Ferdinand Fensky, my brother. We were always on good terms. I corresponded with him after they went to California. The flood of 1903 depreciated the value of the property of land that bordered on the Kansas river. The flood of 1904 also had a bad effect. A great many people lost property along the river. While my brother was living I heard of the Fensky addition and knew he was selling lots and building houses himself. I guess he sold them. I saw people living in the houses. I knew the names of a few of them. I didn't know of any houses being built there except those that my brother built.

I relied entirely on what my husband told me regarding the settlement. I never talked with Mr. Campbell and never got any statement from Mrs. Jeanette Fensky or anybody else in California. I never saw the big sign on the Kansas Avenue bridge advertising this addition. I never made any claim that I was not treated right. I heard about it. I never, myself, made any claim that I was not treated right. I lived here all the time. I remember Frederick Fensky being here for the purpose of looking up the matter. He told me he went down to Fensky's addition and looked over

the property. He stayed here a part of two days and stayed at our house over night.

#### REDIRECT EXAMINATION

I didn't know whether or not Mr. Fensky had sold any of that addition. I did not know a thing about his private affairs.

#### RECROSS EXAMINATION

Mrs. Pickens lived here a great many years before my brother Ferdinand went to California and has lived here ever since. Her family has lived with her. She lives now between Fourth and Fifth on Van Buren Street. Before that she lived on Jackson Street. Jackson Street is the first street west of Kansas Avenue and Van Buren street is the second street. Kansas Avenue is the main business street of Topeka. The street car line to Oakland runs near the Fensky addition. Mrs. Schutt lives in Omaha. I corresponded with her about the time we made this settlement. I never heard her say and I never said anything to her about Fensky's addition. She was here during the time that addition was being laid out; at least when it was being built up. In corresponding with Mrs. Schutt I don't know if I said anything about my assignment.

Deposition of

LOUISA PICKENS,

one of the complainants taken in Topeka, Kansas, on behalf of the plaintiffs, was read in evidence as follows:

## DIRECT EXAMINATION.

I have resided in Topeka, Kansas, about twenty-five years continuously. I was a little acquainted with M. T. Campbell in his lifetime. I was a sister of Ferdinand Fensky, and was acquainted with Jeanette Fensky, his wife, who was sometimes called Jennie. Nothing was said to me at any time about selling my interest in the Ferdinand Fensky estate. I got a thousand dollars from the estate. Mrs. Krauss came over to my house and told me our money was ready, for me to go to Mr. Campbell's office. I depended on Mr. Krauss, my brother-in-law. I didn't know whether he talked with Mr. Campbell about it or not, only from my understanding that he was looking after the estate of his wife and we were on close terms and depended on him. I understood that Mr. Campbell was administrator of the Fensky estate. Mr. Campbell never gave me any statement as to the condition of the estate. What I knew about the estate I learned from Mr. Krauss. Whatever Mrs. Krauss would do I would do. My understanding was that Mr. Krauss finally concluded to accept one thousand dollars. I concluded to do the same about that time. It was my understanding that was our share. When Mrs. Krauss told me my money was ready and to go to Mr. Campbell's office I went there. Mr. Campbell was at the office; no one else was there. He just put a piece of paper down to me and the money was ready, that was the understanding that was given me. He put this paper there for me to sign and I signed it.

Q. Do you know what that paper was?

A. I suppose a thousand dollar receipt for our share.

Q. You supposed you were signing a receipt for the thousand dollars?

A. Yes, for the thousand dollars.

Q. Do you know what that paper was you signed?

A. Why, so I heard.

Q. What do they tell you now?

A. I was signing away my rights.

I am now informed that the paper that I signed was a quit claim for the whole estate. I did not know at that time that I signed the paper that it was a quit claim. I saw Mr. Krauss have a statement in his hand. Mr. Krauss claimed it just explained the property. There wasn't any discussion only putting pieces of property there. I didn't understand how many or how much, he just had the list there.

I did not know during the negotiations or at the time I signed the paper that Mr. Campbell was the attorney and agent for Mrs. Fensky. If I had known that I don't know whether I would have signed it or not. I depended on Mr. Campbell to give the right statement to protect our rights. I depended on him because I thought he was administrator and that was his duty.

I first learned that I had not received all of the Fensky estate I thought I was entitled to in 1912, when my daughter got some letters in California that had been written by Mr. Campbell. My daughter went to California in June, July or August, 1912, to



investigate a certain mortgage that they were to fall heirs to. She returned about a month later and brought with her some letters. I heard some read and read some myself. The letters that I read were signed by Mr. Campbell. That was the first time I believed I had not received all of the Fensky estate that I was entitled to.

The paper you now show me dated 8-3-03, is in the handwriting of my brother Ferdinand Fensky.

The letter was read in evidence as follows:

Altadena, Cal 8/3/03

M. T. Campbell:—

Gibbon is the only way you can handle such people, they fell back over \$100 last year from where the started, made me as much trouble as bal. in addition, big boy is doing nothing. I am done with them had lots of worthless relatives in house when I left, so you know what to say, don't want you to do that kind of work free. J. W. Stoker. The \$100 I condiser a very fair one and would do it at once, but my promise over again and again and their *singing* appearance waiver, which show that they want too, I cant do it as yet. Besides under my condition would not know what to do with the money, let it run on until October. Will write them another letter to sell in a few days I get statement from Bank every 3 or 4 months so if you know when and how much you will need, let me know at least next month.

I have about \$2000.00 on 4% in three banks here, of course they are good at present, but what will they be if they speculated wrong so intend to take out when 6 months time is up. Mortgages bring here 6 to 8% clear of tax, and are best investment, but did not have time I thought to look. Just writing you my ideas—and when it comes will be worse than flood. Don't think will be able to come this Spring.

Truly Yours.

F. Fensky.

Mrs. Fensky fairly well

(Witness continuing): Before receiving the thousand dollars which I have mentioned, I cannot remember whether Mr. Campbell or Mr. Krauss had ever said anything about a list of the property that belonged to the Ferdinand Fensky estate. At the time I signed the paper in Mr. Campbell's office and received a thousand dollars I did not know that Mr. W. C. Stein owed Ferdinand Fensky \$2400., or any other sum, and did not know that Mr. Simms owed \$300., or any part thereof. I did not know that the Pruessner, Goff, and Rost contracts for the sale of the real estate were not included in the inventory Mr. Campbell filed in the probate court.

#### CROSS EXAMINATION

I visited my brother Ferdinand in North Topeka sometimes, not very often. I never saw the big sign he had put there, lots for sale. When I signed the paper in Mr. Campbell's office I understood it was in full for my distributive share of my brother's estate.

I think that was about a year and a half after my brother's death. My daughter went to California to investigate about the Rost mortgage. It was on property on Kansas Avenue. I don't remember whether that was a contract or a mortgage. I think it was first for \$4500., or somewhere about four thousand dollars.

I did not know anything about my brother laying out this addition, or about his selling land on the installment plan. When I went to Mr. Campbell's office he didn't particularly say anything, but he was ready for me. He seemed to understand I was coming. I signed the paper and he gave me a receipt to go to the bank.

Deposition of

JEAN PICKENS SWANSON,

taken in Topeka, Kansas, on behalf of the plaintiffs,  
was read in evidence as follows:

DIRECT EXAMINATION

My name was formerly Jean Pickens. I am Louisa Pickens' daughter. I went to California in June 1912. I returned to Topeka in August, 1912. While I was in California I found some papers, letters and documents which pertained to or which were correspondence between M. T. Campbell and my uncle Ferdinand Fensky's wife. Mrs. Fensky died in California in 1908. Ferdinand died in California in 1903. I had known M. T. Campbell prior to 1912. My first acquaintance was with him after Mrs. Fensky's death. I talked to him pertaining to his administration. I

first learned he was administrator of Ferdinand Fensky's estate in 1904.

Mrs. Laura Coughlin, a cousin in California, called my attention to the letters, documents and correspondence to which I have just referred. She told me where they were. I found them in the office of Mr. Congdon, a lawyer in Los Angeles. He had advised Mrs. Coughlin relative to the Fensky estate. I first saw these letters and documents about July 1912. Mr. Congdon gave them to me personally. I obtained his permission to bring them back to Topeka, and brought them with me when I came. About August, 1912, I called these papers to mother's attention. I read some of the letters to my mother and she read some herself. Prior to going to California, I knew that my mother had assigned her interest in the Fensky estate for one thousand dollars.

I knew of the Rost mortgage in connection with the Fensky estate. Mrs. Fensky died in 1908, and had made a will prior to that time in which she had left the Kansas mortgages to Mr. Fensky's nieces and nephews. This Rost mortgage was on record in Mrs. Fensky's name and it had not been assigned of record and we could not understand if we were inheriting the Kansas mortgages why we were not getting the Rost mortgage also. I asked the probate judge about it and he told me it appeared to him that it was well worth looking into. I couldn't get satisfactory information from Mr. Campbell, and I went to California to get further information. The Rost mortgage covered property on Kansas Avenue. According to the records



Ferdinand Fensky in his lifetime owned the real estate which was subsequently covered by the Rost mortgage. He subsequently sold the lot to Rost on a contract. Following Mr. Fensky's death, a mortgage was given from Rost to Mrs. Fensky. That was the mortgage which I had in mind when I said I was investigating this transaction.

Before going to California, so far as I know, my mother and the other heirs did not know that the entire estate of Ferdinand Fensky had not been inventoried and accounted for in the Kansas courts here in Topeka.

Mrs. Fensky's will stated that all Kansas mortgages which she left were to go to Mr. Fensky's nieces and nephews. This Rost mortgage was on record in Mrs. Fensky's name and we believed it was one of these we inherited, although we were not receiving it through Mr. Campbell, the administrator. I wanted to know why and was investigating and went to California with that in mind.

The several pieces of paper which are now called to my attention were first seen by me among the letters that Mr. Congdon gave me in Los Angeles. When I first saw them they were in the form and condition they are now in. One of the letters purporting to be written on three sheets was in that form when I first observed it. The sheets were pinned together.

The writing in lead pencil was on the sheets when I first saw them in California. The signature to one of the communications is written by Mrs. Fensky. Four pages are in the handwriting of Mrs. Minnie Farns-

worth. She was Mrs. Fensky's niece and lived with her. These several pages numbered 1, 2, 3 and 4 are in the same condition now as when I first saw them in California.

(The papers referred to were read in evidence in connection with the testimony of the witness.

The original papers were identified by Mrs. Minnie Farnsworth, a witness called at the trial, and were offered and received in evidence in connection with her testimony. The same are set forth in full in connection with the evidence of the witness Farnsworth, and are marked Plaintiffs' Exhibits 30, 31 and 32, respectively.)

(Witness continuing): The paper which you now hand me bearing the identification mark "P-28 C D W" written on the front and back of the calendar leaf under date of August 16, 17, 18 and 19, 1903, was with the letters Mr. Congdon gave me. It is in the same condition now as it was when I first saw it.

The paper was read in evidence and is as follows:

(Written on torn Calendar leaf of Aug. 1903)

From,

Campbell to Mrs. Fensky,

Remember I am treating the Simms' note as yrs. Any notes that F turned over to you before he died whether he indorsed them or not you have a right to claim as your own property. I expected the whole of the Simms repairs to apply on the note and tho't I had that agreement with him, but he says he thought I meant that the excess of repairs over rent should

be applied and I tho't it best not to have a controversy over it. I guess the note is pretty safe. The Chat. mortgage is renewed. Some of the addition people are a little slow but I am gradually getting matters in that "neck of the woods" in the shape I want them. Have 8 mortgages now. Had to pay taxes for the two Brossamers, nearly \$100 each on account of new sidewalks, but it is all right. -- Have taken mortgage from Geo. & included the taxes in it. I want as many to take deeds as I think it safe to take a mortgage from before any further steps are taken in Probate Court, but it will not do to allow them to think I am in a hurry about it. There are 8 or 10 others that can have deeds when their minds are "ripe" for it.

Pete Smith would buy the mortgages, only he wants them discounted so he can realize 7 per cent on them.

P-28

C D W.

(Witness continuing): The paper which you now hand me bearing the identification mark "P-37 C D W." was also with the letters which Mr. Congdon gave me in California, and is in the same condition now as when I first saw it.

The paper was read in evidence and is as follows:

Just now got this. Return it sometime. I am a little disappointed but we had better settle with all those who will accept the \$1000 anyhow and let the others wait awhile.

If Mrs. Krauss accepts I think we had better get assignments from her & Mrs. Pickens as soon as we

can. If they accept, it means that Mrs. Wendt accepts also. If the Topeka heirs are eliminated from a possible contest in court, I feel that there is less likelihood of the "foreigns" heirs making any fight. I think K's decision will also decide Charles case as Chas. wrote him about it.

If any of the others write me will post you immediately. C.

P-37

C D W.

(Witness continuing): The paper which you now hand me bearing the identification mark "P-13 C D W." was also with the letters that I got from Mr. Congdon, and the same is now in the same condition as it was when I first saw it, especially as to erasures and changes.

The said letter was read in evidence.

(It was stipulated and agreed that a full, true and correct copy of the said letter appears in the record of the deposition of W. C. Stein, the same being dated at San Pedro, California, September 15, 1903, addressed to Mr. and Mrs. W. C. Stein, Topeka, Kansas, and signed "Mrs. Fred Fensky by Minnie.")

(Witness continuing): The paper bearing the identification mark "P-14 C D W." dated September 23, 1903, was also among the letters Mr. Congdon gave me in 1912, and is in the same condition now as when I first saw it, especially as to erasures and changes.

(The said letter was read into the record, and it was stipulated that a full, true and correct copy of



the letter appears in the record of the deposition of W. C. Stein.)

(Witness continuing): The paper bearing the identification mark "P-53 C D W" addressed to M. T. Campbell, and signed by Jeanette Fensky, written on the back of some blank checks was also with the letters that Mr. Congdon gave me and is now in the same condition as it was when I first saw it.

The said letter was read in evidence and is as follows:

San Pedro, Calif.

M. T. Campbell,

Admn'r Estate of Ferdinand Fensky, Deceased  
Topeka, Kansas.

Dear Sir:-

As I am entitled to at least half of the Kansas estate of my deceased husband and as the chances of your having to use any material portion of it to pay debts is so slim, I hope you will see your way clear to advance me at least from 4000 or \$7000 of the funds when collected even before you report to the Probate Court and should the court for any reason require you to have the *the* money on hand I will promptly reimburse you for all you may thus advance me.

You know I have property enough there to make this promise good in case of any delay on my part. I will send you receipts for all you thus advance me on my share of the estate.

Respy,

Jeanette Fensky

Widow of Ferdinand Fensky, deceased.

Mrs. Fensky:—

If you think best submit the above to Judge Goodrich and if it meets his and your approval write it off without any date sign it as I have indicated and send to me.

P 53

C D W

Deposition of

RALPH H. GAW,

taken in Topeka, Kansas, on behalf of the plaintiffs, was read in evidence as follows:

I have resided in Topeka, Kansas, more than thirty years. I am Probate Judge of Shawnee County, and am the custodian of the records and files in that office. The probate court in Kansas is a court of record, and its jurisdiction consists of the administration of estates and guardianships and other matters. I have in my custody as Probate Judge the records and files of the estate of Ferdinand Fensky, deceased. I have brought them with me. Office number of that case is 4549.

The entire file and record of the estate of Ferdinand Fensky, deceased, as shown by the records of the probate court in Shawnee County Kansas, were offered and read in evidence.

The Petition for Appointment of Administrator, filed September 9, 1903, is in words and figures following:

IN THE PROBATE COURT OF SHAWNEE  
COUNTY, KANSAS.

In the Matter of the Estate of )  
Ferdinand Fensky, ) PETITION FOR  
Deceased. ) APPOINTMENT  
OF ADMIN-

COMES NOW The undersigned Petitioner, and on oath says that Ferdinand Fensky, a resident of Los Angeles County, and the State of California, died on the 7th day of August 1903, intestate; that the names, relationship and place of residence of the heirs of said deceased are as follows, to-wit: Jeanette Fensky his widow whose home is in San Pedro, California. He never had any children.

And Your Petitioner Further Says, That said Ferdinand Fensky died seized and possessed of real property in this county of an estimated value of \$1500.00, and of personal property of an estimated value of \$4000.00

And Your Petitioner Further Says, that M. T. Campbell is a bona fide resident of Shawnee County and the State of Kansas, and a competent, worthy and suitable person to assume the responsibilities and obligations of Administrator of the estate of said Ferdinand Fensky deceased.

WHEREFORE, Your petitioner prays that this Court grant Letters of Administration to said M. T. Campbell.

J. W. McClure

Subscribed and sworn to before me, this 9th day of  
Sept 1903.

R. F. Hayden

Probate Judge

(SEAL)

The order appointing administrator was filed September 9, 1903, and is as follows:

IN THE PROBATE COURT OF SHAWNEE  
COUNTY, KANSAS.

In the Matter of the Estate of	)ORDER
	)APPOINTING
Ferdinand Fensky	)ADMINISTRATOR.
deceased.	)

NOW, On this 9<sup>th</sup> day of September, 1903, the petition of *of* J. W. McClure, for the appointment of an Administrator of the estate of Ferdinand Fensky, deceased, came on for hearing. The evidence was heard and the matter submitted to the Court, on consideration whereof the Court finds: That said Ferdinand Fensky died on the 7<sup>th</sup> day of August 1903, intestate; that at the time of his death he was a resident of Los Angeles County in the State of California, that the names, relationship and places of residence of the heirs of said deceased are as follows, to wit:

Jeanette Fensky, widow, San Pedro, Cal.

And the Court Further Finds, That said Ferdinand Fensky died seized and possessed of real property in this county of an estimated value of \$1500.00, and of personal property of an estimated value of \$4000.00.

And the Court Further Finds, That M. T. Campbell is a bona fide resident of Shawnee County, State



of Kansas, and a competent, worthy and suitable person to assume the responsibilities and obligations of Administrator of the estate of said Ferdinand Fensky deceased.

IT IS THEREFORE by the Court ordered, that said M. T. Campbell, be and he is hereby appointed Administrator of the estate of said Ferdinand Fensky deceased, and that he execute his bond in the sum of \$8000.00, with conditions and sureties according to law.

R. T. Hayden,

(SEAL)

Probate Judge.

The oath of administrator was sworn to and filed September 9, 1903, and letters of administration were issued and filed on the same date.

The inventory and appraisalment was filed October 26, 1903, and is as follows:

THE FOLLOWING IS A TRUE INVENTORY OF ALL THE GOODS, CHATTELS, MONIES, RIGHTS AND CREDITS OF FERDINAND FENSKY, DECEASED, WHICH ARE BY LAW TO BE ADMINISTERED IN KANSAS AND ALSO AN INVENTORY OF THE REAL ESTATE IN KANSAS OF FERDINAND FENSKY, DECEASED.

Before the death of Ferdinand Fensky I had in my hands for collection for him Two notes on J. W. Stoker and M. E. Stoker and their wives which were secured by mortgages on the W. 40 ft. of lots 138, 140, 142, and 144 on Jackson St. in the city of Topeka,

Kansas; Each of said notes drew six per cent interest. One was for \$2500.00 with all interest paid on same up to the 8th of February 1903, and the other was for \$1285.00 with all interest paid on same up to 25th June 1903. Besides these, I held claim against said Stokers for taxes paid by said Fensky on said premises amounting at time of my appointment with interest to \$408. About the time I was appointed Administrator the Stokers sold the mortgaged premises to G. O. Smith who immediately paid me \$4297.14 in full satisfaction of said notes and tax claim and as administrator of said estate I satisfied said mortgages of record. I therefore inventory as belonging to said estate said sum of.....\$4297.14

Since the death of said Fensky I have received from his widow the following notes and mortgages.

No. 1.— Note dated 28th. June 1885 for \$1800 made by Medora and Carrie Millice and secured by mortgage on lot 88 Kansas Avenue in the City of Topeka, Kansas, on which note there has been paid \$300 on the principal and all interest has been paid up to the 1st. day of January 1903.

Balance due, .....\$1500.00  
with 6 per cent interest since 1st. January 1903.

No. 2.— Note dated 27th. October 1900 for \$300 made by J. W. and Emily Rigdon secured by unrecorded mortgage on lots 427 and 429 on Quincy St. in North Topeka, Kansas, and which note has all been paid except \$30.50 with 7 per cent interest since 14th January 1903.

No. 3. – Note dated 8th November 1899 *fro* \$300 made by Amelia and Jacob Bausch (unsecured) on which there has been paid \$100 on the principal and all interest has been paid up to 8th November 1902.

Balance due .....\$200.00  
with 6% interest since 8th. November 1902.

No. 4. – Note dated 18th. December 1901, for \$100.00, made by J. A. Luken and Belle Lukens (unsecured) on which interest has all been paid up to 18th December 1902.

Balance due .....\$100.00  
with 7% interest since 18th. December 1902.

No. 5. – Note dated 18th. December 1901 for \$900.00, made by Lukens Bros and their wives (unsecured) on which interest has all been paid up to 18th. December 1902.

Balance due .....\$900.00  
with 7% interest since 18th. December.

No. 6. – Note dated 5th. September 1900, made by M. R. Mitchell and wife M. M. Mitchell, and secured by Mortgage on Lot 99 and N. 25 feet on lot 97 on Van Buren St. in N. Topeka, Kansas, and on which note there has been paid \$800 on the principal and all interest has been paid up to the 5th day of March 1903.

Balance due .....\$2000.00  
with 6% interest since 5th. March 1903.

No. 7. – Note dated 12th. May 1899 for \$2400.00, made by Kate, Henry, Fred, Edward, and Herman Buechner, and secured by mortgage on the Buechner Homestead and meat-shop in North Topeka, Kansas, and on

which note there has been paid \$900.00 on the principal and all interest is paid up to the 12th. May 1903.

Balance due .....\$1500.00

with 6% interest since 12th May 1903.

No. 8. – Note dated 1st. July 1901 for \$100.00, made by W. C. Stadel and Veronica Stadel (unsecured) on which all interest is paid up to 1st. July 1903.

Balance due .....\$100.00

with 7% interest since 1st. July 1903.

No. 9. – Note dated 2d. May 1895 for \$250.00 made by the same Stadel (unsecured) on which all interest is paid up to 2d. May 1903.

Balance due .....\$250.00

with 8% interest since 2d. May 1903.

No. 10. – Note dated 26th. August 1901 for \$300.00 made by Mary and J. W. Stump and secured by mortgage on lots 58 and 59 Jackson Street in Fiery's Addition in N. Topeka, Kansas, (and the house on which was washed away by the late flood) and on which note there has been paid about \$135 on the principal and all interest has been paid up to 26th. August 1902.

Balance due about.....\$165.00

with 6% interest since 26th. August 1902 (?).

No. 11. – Note dated 24th. May 1899 for \$1350, made by Elizabeth and Alonzo Wardell and secured by mortgage on lots 77 and 79 on Van Buren St. (South) in the City of Topeka, Kansas, on which all interest has been paid up to 24th. November 1902 and \$30.50 more.

Balance due .....\$1350.00



with 7% interest since 3d. January 1900 up to 3d. July 1903 and since then at 6½%.

No. 12. – Note dated 3d of July 1897 for \$2500, made by E. and F. A. Tuttle secured by mortgage on about 100 acres of land in Sec. 21 T. 11, R. 15 in Shawnee County, Kansas, and on which note all interest is paid up to 3d. January 1903.

No. 13. – Note dated 18th. July 1899 for \$400, made by Jacob and Kate Petri and secured by mortgage on lots 110 and 112 on Leland St. in Veale's Addition to the City of Topeka, Kansas, and on which note all interest is paid up to 18th. July 1903.

Balance due .....\$400.00  
with 7% interest since 18th. July 1903.

No. 14. – Note dated 1st. November 1888 for \$1800, made by John Carter and secured by mortgage on W. ½ of S. W. ¼ and E. ½ of S. W. ¼ of Sec. 16, T. 13, R. 15, in Shawnee County, Kansas, and on which note there has been paid \$300 on principal and all interest is paid up to 1st. May 1903, Balance due. ....\$1500.00  
with 6% interest since 1st. May 1903.

No. 15. – Note dated 25th. November 1898 for \$470, made by Joseph and Lizzie Bausch secured by unrecorded mortgage on 25 acres. of land in Sec. 29, T. 9, R. 16, in Jackson County, Kansas, on the principal of which note there has been paid \$170 and all interest has been paid up to 25th November 1902.

Balance due .....\$300.00  
with 6% interest since 25th. November 1902.

No. 16. -- Note dated 4th. January 1902 for \$800. made by J. H. Foucht (unsecured) and on which all interest is paid up to 4th. January 1903.

Balance due .....\$800.00  
with interest at 7% since 4th. January 1903.

No. 17. -- Note dated 27th. March 1902 for \$550, made by Amos J. Hutchinson and secured by mortgage on N. 80 acres N. W.  $\frac{1}{4}$  of Sec. 2, T. 10, R. 16 E. in Shawnee County, Kansas, and on which all interest has been paid up to 27th. March 1903.

Balance due .....\$550.00  
with 7% interest since 1st. November 1902.

No. 18. -- Note dated 1st. September 1902 for \$400, made by John Sheetz and secured by mortgage on his homestead on Quincy Street in N. Topeka, Kansas, 50 X 170 feet, and which note all interest is paid up to 1st. March 1903.

Balance due .....\$400.00  
with 6% interest since 1st. March 1903.

No. 19. -- Note dated 21st. April 1902 for \$100, made by E. D. Jones and wife (unsecured).

Balance due .....\$100.00  
with 7% interest since 21st. April 1902.

No. 20. -- Note dated 1st. August 1900 for \$500, made by F. A. Root and wife and secured by mortgage on N.  $\frac{1}{2}$  of lot 81 on Quincy Street N. Topeka, Kansas, and on which all interest has been paid up to 1st. February 1903.

Balance due .....\$500.00  
with 6% interest since 1st. February 1903.

No. 21. – Note dated 1st. December for \$700.00, made by Joseph E. and Lizzie Bausch secured by unrecorded mortgage and on which note all interest is paid up to 1st. December 1902.

Balance due .....\$700.00  
with 6% interest from 1st. December 1902.

No. 22. – Note dated 1st. April 1903 for \$700, made by Geo. E., Lester K. and Geo. C. Stoker (unsecured).

Balance due .....\$700.00  
with 7% interest since 1st. April 1903.

No. 23. – Note dated 26th. June 1891 for \$400, made by Paul Hauschild *an* wife, secured by mortgage on Lots 146, 148, 150 on Locust Street in Veale's Addition to the City of Topeka, and on which note there has been paid \$250 on the principal and all interest is paid up to 26th. June 1902.

Balance due .....\$150.00  
with 7% interest from 26th June 1902.

The real estate belonging to said estate in Kansas consists of a part of what is known as Fensky's Additions to the City of Topeka, about 12 acres in Reserve 5 in Shawnee County, one lot on the East side of Quinby Street South, between 2d, and 3d. Streets in the City of Topeka, Kansas; lot 61 on Kansas Avenue South in said City, Lot 61, a part of lot 63, a part of lot 71, a part of lot 64, a part of lot 66, and a part of lot 88, all on Kansas Avenue in North Topeka, Kansas.

WITNESS my hand this 22nd day of October 1903.

M. T. CAMPBELL,

Administrator of said Estate.

Subscribed and sworn to before me this 22d. day of  
October 1903.

R. F. Hayden.

— : Appointment of Appraisers. :—

STATE OF KANSAS, )  
 ) SS  
SHAWNEE COUNTY. )

To C. P. Bolmar, Frank Ward, and John Nystrom:

You are hereby appointed to appraise on oath the personal estate and effects comprised in the inventory of the estate of Ferdinand Fensky deceased, at such time and place as may be designated by the Administrator of said Estate.

WITNESS my hand and official seal at my office  
in the City of Topeka in said county this 22d. day of  
October 1903.

R. F. HAYDEN,  
Probate Judge.

### Oath of Appraisers.

STATE OF KANSAS, )  
 ) ss  
Shawnee County. )

We, the undersigned disinterested householders of said county, do solemnly swear that we will truly, honestly, and impartially appraise the personal property of the estate of Ferdinand Fensky deceased, which shall be exhibited to us, and perform such other duties as may be required by law in the premises, to the best of our knowledge and ability. So help us God.

(SEAL)

C. P. Bolmar.  
Frank M. Ward.  
John Nystrom.



Subscribed and sworn to before me this 22d. day  
of October 1903.

F. P. Campbell

Notary Public.

My commission expires Aug. 13" 1907.

Appraisement of the personal estate and effects set  
forth in the above and foregoing Inventory of M. T.  
Campbell:

We appraise the note at No. 1 of said Inventory at .....	\$1500.00
The note at No. 2 at.....	\$30.50
The note at No. 3 at.....	\$ 200.00
the note at No. 4 at.....	\$ 100.00
The note at No. 5 at.....	\$ 900.00
The note at No. 6 at.....	\$2000.00
The note at No. 7 at.....	\$1500.00
The note at No. 8 at.....	\$ 100.00
The note at No. 9 at.....	\$ 250.00
The note at No. 10 at.....	\$ 100.00
The note at No. 11 at.....	\$1350.00
The note at No. 12 at.....	\$2500.00
The note at No. 13 at.....	\$ 400.00
The note at No. 14 at.....	\$1500.00
The note at No. 15 at.....	\$ 300.00
The note at No. 16 at.....	\$ 800.00
The note at No. 17 at.....	\$ 550.00
The note at No. 18 at.....	\$ 400.00
The note at No. 19 at.....	\$ 100.00
The note at No. 20 at.....	\$ 500.00
The note at No. 21 at.....	\$ 700.00

The note at No. 22 at.....	\$ 700.00
The note at No. 23 at.....	\$ 150.00
	<hr/>
	\$16630.50

C. P. Bolmar

F. M. Ward

John Nystrom

Appraisers

The account of Administration and petition for distribution and final discharge is as follows:

IN THE PROBATE COURT OF SHAWNEE  
COUNTY, KANSAS.

-----

IN THE MATTER OF THE ESTATE OF  
FERDINAND FENSKY, DECEASED.

-----

Account of Administration and Petition for  
Distribution and Final Discharge.

-----

To the Honorable Probate Court:

And now comes M. T. Campbell, Administrator of said estate, and represents to the court that since his appointment as such administrator no claims of any kind have been presented to him or filed for allowance against said estate, and that from his long and intimate acquaintance with deceased and from his knowledge of his financial affairs and methods of doing business for many years next preceding his death, said administrator has reason to believe and does believe

that said Fensky left no debts when he died and that no claims for indebtedness due from him will ever be presented or filed against his estate -- that the inventory filed by this administrator soon after his appointment of moneys, notes and mortgages represents all the property belonging to said estate in the State of Kansas to be distributed to and among the heirs of said Ferdinand Fensky -- that at the death of said Ferdinand Fensky in the state of California he left surviving him as his only heirs at law, his widow, Jeanette Fensky of San Pedro, California.

His sister, Mrs. Ida Wendt, Culmsee, Germany.

His brother, Friedrich Fensky, Leavenworth, Kansas.

His sister, Johannah Schutts, Omaha, Nebr.

His sister, Louise Pickens, Topeka, Kansas.

His sister, Augusta Krauss, Topeka, Kansas.

His sister, Hulda Richter, West Berkeley, Calif.

His brother, Charles Fensky, Pueblo, Colo.

and His nephew, George Fensky, Topeka, Kansas.

-- that since the appointment of this administrator, said Jeanette Fensky has purchased all the right, title and interest of each of the other heirs in and to said estate, and that she is now the sole owner of all the estate left by said Ferdinand Fensky, and the only heir at law interested in the settlement thereof, and that said estate is now in a condition to be closed.

Said administrator therefore charges himself with all the personal property inventoried by him in this court and is ready to turn over the same to said Jeanette Fensky less all legal expenditures and costs of

administration, whenever so ordered by the court. (An itemized statement of such expenditures and costs is hereto attached marked Exhibit A and is made a part hereof)

And he respectfully requests the court to so order, and that upon his filing in this court a receipt from said Jeanette Fensky for all monies and property in the hands of said administrator belonging to said estate, that he be discharged from his trust as such administrator and his bondsmen released from any and all responsibility as his sureties.

M. T. Campbell

Administrator.

STATE OF KANSAS. )  
                                  ) SS  
SHAWNEE COUNTY. )

I do solemnly swear that I am the above named administrator and that the foregoing report is a true and accurate account of my administration upon the above named estate.

M. T. Campbell

Subscribed and sworn to before me this 26th day of  
April 1905.

F. P. Campbell

Notary Public.

(SEAL)

My commission Expires Aug. 13, '07



## Exhibit A.

The following amounts have been expended for the purposes indicated below, and therefore the estate is debtor.

1903	Sep 10	To cash paid for recording assignment and discharge of Stoker Mortgages	\$ 1.50
	Oct. 22	To cash paid appraisers	6.00
	Nov. 3	To cash paid for recording assignment of Carter mortgage	.50
	" 5	To check to Probate Judge	14.00
	Dec. 1	To cash paid for release of Carter mortgage	1.00
	" 5	To cash paid for discharge of Petri mortgage	.25
1904	Mar. 31	To " " " Bueckner "	.25
	May 10	To " " " Root "	1.00
	June 25	To " " publishing notice of appointment	3.00
	Aug. 13	To " " discharge of Hanschild mortgage	.25
	Nov. 30	To " " copy of complaint in Rost case in U. S. C't	2.75
	Dec. 12	To Cash paid for taxes of 1904	406.94
1905	Mar. 17	To " " Jeanette Fensky	11026.10

The order and decree of distribution is as follows:

IN THE MATTER OF THE ESTATE OF  
FERDINAND FENSKY, DECEASED.

And now on this 5th day of June 1905, comes M. T. Campbell, administrator of the estate of Ferdinand Fensky, deceased, and presents his report and asks that said estate be closed and he be discharged from further duty as such administrator. And the court after duly considering said report and hearing all the evidence in support thereof and being fully advised in the premises finds that due notice of his intention to make final settlement of said estate at this time has been given in all respects as required by law and that Jeanette Fensky, the widow of said Ferdinand Fensky, and one of his heirs at law, has purchased of all the other heirs at law of said Ferdinand Fensky their interests in his estate and has taken written assignments from them therefor, and that she is now the only heir at law of said Ferdinand Fensky, deceased, who is interested in the administration and distribution of said estate, and is the sole owner of all the property left by said Ferdinand Fensky and is entitled to have turned over to her all monies, notes and mortgages in the hands of said administrator, and that all the statements in said Report are true.

It is therefore considered, ordered and adjudged by the court that said administrator turn over to said Jeanette Fensky all the monies, notes and mortgages held by him as such administrator and take her receipt for same. And it is further ordered and adjudged by

the court that upon the filing of such receipt in this court said M. T. Campbell be finally discharged as such administrator and that his bondsmen be released from all liability as his sureties.

R. F. Hayden

(SEAL)

The final discharge is endorsed "Filed June 6, 1905," and is as follows:

STATE OF KANSAS )	
)	In the Probate Court of
SHAWNEE COUNTY.)	said County

IN THE MATTER OF )	
THE ESTATE OF )	
Ferdinand Fensky )	Journal Entry --
Deceased. )	Final Discharge.
)	

And now on this 6th day of June 1905, comes M. T. Campbell, the administrator of the above named estate, and files receipt from Jeanette Fensky for all the monies, notes and mortgages, order to be paid and turned over to her by this court at the hearing of the final account and report of said M. T. Campbell as such administrator on the 5th day of June 1905.

And it being made to appear to the Court that said M. T. Campbell has fully complied with said order of the Court in every particular,

NOW THEREFORE, it is by the court considered, ordered and adjudged that said estate be, and it is hereby fully and finally closed.

And it is further considered, ordered and adjudged, that said M. T. Campbell and his sureties be, and they

are hereby discharged and released from further liability on the bond of said M. T. Campbell as such administrator.

R. F. Hayden

Probate Judge

SEAL

The receipt of Jeanette Fensky is endorsed "Filed June 27, 1905," and is as follows:

In the matter of the estate of Ferdinand Fensky, deceased, In the Probate Court of Shawnee County, Kansas.

RECEIPT

I have received of M. T. Campbell the Administrator of said estate in Kansas, payment in full of the monies collected by him as Administrator -- less costs of court & taxes paid by him -- and I have also received from him all notes & mortgages still uncollected that went into his hands as such Administrator, & being satisfied that there are no further duties for him to perform in the estate I am *willin* for, & I hereby request him to make final settlement of said estate & I ask the Court to grant him a discharge as Administrator & release his Bondsmen from further liability

Jeanette Fensky,

Sole heir at law interested in *in* the settlement of said estate.

Dated at San Pedro

California May 1st, 1905.



## Deposition of

H. C. McKINLEY,

taken in Topeka, Kansas, on behalf of the plaintiffs,  
was read in evidence as follows:

## DIRECT EXAMINATION

I am assistant cashier of the Citizens State Bank in Topeka. I have been connected with the bank for thirty-five years. I knew M. T. Campbell in his lifetime. I have made a search of the records of the bank to ascertain whether M. T. Campbell, as administrator and individually, kept an account in the bank in 1903. The bank has no record of that account for the reason that the bank records were destroyed during the flood in 1903, except a check that Mr. Campbell gave. In 1903, Ferdinand Fensky had no account in that bank. That account is M. T. Campbell, administrator of the estate of Ferdinand Fensky. I knew Ferdinand Fensky during his lifetime. According to my recollection he kept an account in the bank for a number of years, and I think he had an account at the time of his death. I couldn't tell how much. The paper which you now show me, dated Topeka, Kansas, October 5, 1903, signed by M. T. Campbell, agent for Jeanette Fensky, is a receipt given to the Citizens State Bank by M. T. Campbell, agent for Jeanette Fensky, for \$913.57. That is a check that was paid by the Citizens State Bank October 6, 1903. It was paid by two Chicago drafts. One for \$886.57 and the other for \$27.00. My recollection is that the money on deposit in the bank that was taken up by these checks was in the estate of F. Fensky, M. T. Campbell, ad-

ministrator. Receipt for \$913.57 includes the amount stated in the receipt for \$27.00.

The receipts referred to were read in evidence as follows:

\$27                                      Topeka, Kansas, 5th Oct. 1903.

Received from Citizens State Bank

Nine Hundred & Thirteen & 57/100.....Dollars,

in draft on Chicago payable to Jeanette Fensky,

One for \$886.57 & one for \$27.00

\$913.57

M.T. Campbell

Agt of Jeanette Fensky

Topeka, Kansas, 5th Oct, 1903

Received from the Citizens State Bank

Twenty Seven .....Dollars

for the administrator of the estate of F. Fensky,  
deceased.

\$27.00

M. T. Campbell

Chg F. Fensky acct.

Deposition of

F. P. ELMORE,

taken in Topeka, Kansas, on behalf of the plaintiffs,  
was read in evidence as follows:

#### DIRECT EXAMINATION

I have resided in Topeka about eighteen years. I am cashier of the Shawnee State Bank, and have been connected with the bank nearly sixteen years. I was with that bank in 1903 and 1904. The records of the bank show that M. T. Campbell, as administrator, kept an account in that bank in 1903. In September 1903, as administrator, he had on hand in the Shawnee

State Bank \$4297.14. January 31, 1905, this money was checked out and placed to his personal account. The books of the bank show that that amount of money was continually in the bank from September, 1903, until January, 1905, under the name of M. T. Campbell, administrator. The entire amount was *transferred* to his personal account January 31, 1905, and the administrator account was closed. He continued to keep an account in the bank under his own name after January, 1905.

Deposition of

E. A. CAMPBELL,

taken in Topeka, Kansas, on behalf of the plaintiffs, was read in evidence as follows:

I reside in Topeka. I am county treasurer and have custody of the books and papers pertaining to that office in the past. The records of that office show the names of persons who are charged with personalty tax. I have made a search of the records of my office from 1882 to 1903 to ascertain whether Jeanette Fensky was charged with or paid personal tax in this county. I couldn't find the name of Jeanette Fensky upon the books as having been charged with or paid personal tax during that time. In the search that I made I did not find any personal tax in that period charged to Jennie Fensky.

Deposition of

RALPH H. GAW, (recalled)

taken in Topeka, Kansas, on behalf of the plaintiffs, was read in evidence as follows:

I am the probate judge of this county and have custody of the probate records. By reference to the court files which are now in my hand I can state that the petition for the appointment of administrator in the estate of Jeanette Fensky was filed October 9, 1908. I now produce the records.

The petition for the appointment of administrator is as follows:

IN THE PROBATE COURT OF SHAWNEE  
COUNTY, KANSAS.

In the Matter of the estate of  
Jeanette Fensky, Deceased.

Petition For Appointment of  
an Administrator.

And now comes the undersigned residents of Shawnee County, Kansas, & legatees under the will of Jeanette Fensky late of Los Angeles County, California, deceased & respectfully request the Court to appoint Matt Campbell, Administrator with the will annexed to the estate in Kansas of said Jeanette Fensky.

(Signed)

George Krauss,  
Leopold Krauss.  
Antonia Krauss.  
Theresa Krauss  
John P. Krauss

Endorsed on the back as follows: 5477 In the Matter of the estate of Jeanette Fensky, deceased. Petition for Appointment of Administrator. Filed. Oct. 9, 08. R. F. Hayden, Probate Judge. 75-212.



The order appointing administrator was filed October 9, 1908, and by the said order Matt Campbell was appointed administrator with the will annexed of the estate of Jeanette Fensky, deceased, and the authenticated copy of the will was admitted to probate. The records of the probate court of Shawnee County Kansas, appearing in the deposition of the witness Gaw, show that Letters of Administration with the will annexed were issued to Matt Campbell, and filed October 10, 1908; also that the oath of Matt Campbell was sworn to and filed October 9, 1908; also that the bond of Matt Campbell, administrator with the will annexed, was filed October 10, 1908.

The inventory and appraisement is as follows:

Inventory and Appraisement of the Residue of the Personal Property and Effects of said Estate. Statement of all Goods and Chattels of said Estate.

Description of the property	Estimated value
One mortgage dated 1st Sept 1907 on the South 25 feet of lot 71 on Kansas Avenue in North Topeka, made by H. L. Pruessner & Lizzie Pruessner his wife to secure ten notes made by them of even date with mortgage for \$200. each & payable one every six months & all bearing interest at six per cent & all unpaid.	\$1600.00

Balance due on a note made by M. E. Grant on 1st May 1904 of \$63.26 which will be due & payable on May 1st 1911 - & which is secured by mortgage on Lots 25 & 27 on Lake Street in Fensky's addition to Topeka,	63.00
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Witness our hands this 10th day of October, 1908.

Henry H. Hall

Albert B. Webber

C. P. Bolmar

Appraisers.

Attest:

Matt Campbell,

Administrator

Statement of all moneys, bank bills and other circulating medium belonging to said estate.

Since the death of Jeanette Fensky on the 9th of July, 1908 – I have collected of the Goffs on their land contract mentioned below & now hold————\$67.50

Description of Real Estate Belonging to said Estate

The only real estate belonging to said estate is 12 acres in Kaw Reserve No five (5) just North of the mouth of Soldier Creek & this land Jeanette Fensky contracted to sell to Edmond Goff & E N. Goff on the 10th day of August, 1904 for \$1800.00 payable in eight years from the 1st day of March 1905 with interest at 5 per cent payable yearly. Said Goffs are in possession of said land under said contract & have kept their interest paid up. The above mentioned \$67.50 in my hands is the interest I have collected on their contract since the death of Mrs. Fensky.

STATE OF KANSAS, SHAWNEE COUNTY, ss.

I, the undersigned, do solemnly swear that I am the above-named Administrator of the estate and effects of Jeanette Fensky, deceased; that the within, foregoing and above inventory is, in all respects, just and

true; that it contains a true statement of all the estate and property of said deceased which has come to my knowledge, and particularly of all moneys, bank bills and other circulating medium belonging to said deceased, and of all just claims of said deceased against myself and all other persons, according to the best of my knowledge. So help me God.

Subscribed and sworn to before me, this 10th day of October, 1908.

Matt Campbell

Executor-Administrator.

R. F. Hayden

Probate Judge.

The partial accounts of Matt Campbell, as administrator of the estate of Jeanette Fensky, deceased, were sworn to and filed December 6, 1909, January 28, 1911, March 4, 1912, and May 5, 1913, and the final account was sworn to and filed May 8, 1913.

The journal entry on the settlement of the final account of Matt Campbell, administrator of the estate of Jeanette Fensky, deceased, was filed May 13, 1913, and is as follows:

STATE OF KANSAS, SHAWNEE COUNTY.  
IN THE PROBATE COURT OF SAID COUNTY.  
IN THE MATTER OF THE ESTATE OF )  
JEANETTE FENSKY, deceased. )

JOURNAL ENTRY - FINAL SETTLEMENT.

Now, on this 13th day of May, 1913, the matter of the final settlement of the accounts of Matt Campbell,

as administrator of the estate of Jeanette Fensky, deceased, came on for hearing. The evidence was heard and the matter submitted to the court, on consideration whereof the court finds: That due notice has been given by publication, as provided by law, to all creditors and all others interested in said estate of the intention of said administrator to make final settlement at this term of court, and for an order of the court finding and adjudging who are the heirs of Jeanette Fensky, deceased; that said estate has been fully administered; and that the court ought to make final settlement of the accounts of said Matt Campbell as administrator.

AND THE COURT FURTHER FINDS: That there is now in the hands of said Matt Campbell, as such administrator, the sum of Eighteen Hundred & Seventy eight 42 Dollars; that said estate is not liable to a tax under the laws relating to the assessment and taxation of legacies and successions; that said tax has been paid; that costs in this court to the amount of Eleven and 95/100 Dollars are all paid; that the services of said Campbell since his last report as such administrator, are reasonably worth the sum of One Hundred & Seventy five Dollars; that after deducting from said sum of Eighteen Hundred & seventy Eight & 42 Dollars the unpaid costs and the reasonable value 100

of the services of said Administrator, there is left for distribution among the heirs and legatees of said Jeanette Fensky, deceased, the sum of Seventeen Hundred & Three 42 Dollars; that said sum should be



distributed as provided by the terms of the will of the deceased; that the heirs of the deceased are Laura Coughlin, Bain Fensky, Addie Colton, Chas. Fensky, George Fensky, Chas. Richter, Morand Schutt, Chas. Schutt, Mrs. W. E. Benedict, Mrs. A. W. Jorgensen, Augusta Pickens, Sidney Pickens, Josie Pickens, Jean Pickens, Eileen Pickens, Anna McHenry, Hulda Emmerly, Leopold Krauss, Geo. Krauss, John Krauss, Theresa Krauss, Antonia Krauss.

AND THE COURT FURTHER FINDS: That all the acts and proceedings of said Matt Campbell, as such administrator have been in accordance with law and the orders of this court; that said estate should be closed and that said Matt Campbell should be discharged as such administrator and his sureties ought to be relieved from all further liability on his bond, as such administrator.

IT IS THEREFORE, by the court considered, ordered and adjudged, that the publication of notice of the intention of said administrator to make final settlement of his accounts be, and the same is hereby approved.

AND IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED, That said Matt Campbell be, and he is hereby allowed for his said services as such administrator, the sum of One Hundred & Seventy five Dollars; that he distribute the money now in his hands as follows, to-wit:

That he pay the costs now due in this court, taxed in the sum of           Dollars,

First, That he retain for his services the sum of One Hundred & Seventy five Dollars,

Second, That he distribute the residue of said estate, as follows:

To Laura Coughlin, Bain Fensky, Addie Colton, Chas. Fensky, George Fensky, Chas. Richter, Morand Schutt, Chas. Schutt, Mrs. W. E. Benedict, Mrs. A. W. Jorgenson, Augusta Pickens, Sidney Pickens, Jean Pickens, Josie Pickens, Eileen Pickens, Anna McHenry, Hulda Emmertz, Leopold, Krauss, George Krauss, John P. Krauss, Theresa Krauss & Antonia Krauss each the sum of \$77.43.

AND IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED, That upon the filing of the receipts of the aforesaid heirs and legatees for the several sums ordered to be paid to them as aforesaid, that said estate of Jeanette Fensky, deceased, be closed; and that said Matt Campbell be discharged as administrator of said estate, and his sureties be released from any and all further liability on the bond of said Matt Campbell as such administrator.

Hugh MacFarland, Probate Judge.

The final discharge of Matt Campbell, as administrator of the said estate was filed December 21, 1914, and is as follows:

STATE OF KANSAS,	)	IN THE PROBATE
	)	COURT OF SAID
Shawnee County.	)	COUNTY.
IN THE MATTER OF	)	JOURNAL ENTRY -
THE ESTATE OF	)	FINAL
Jeanette Fensky, Deceased.	)	DISCHARGE.

AND NOW, on this 21st day of December 1914, came Matt Campbell the administrator of the above-

named estate, and files receipt from each and every of the heirs and legatees of said estate for the several sums ordered to be paid to said heirs and legatees by this Court, at the hearing of the final account of said Matt Campbell as such administrator, on the 13th day of May 1913.

And it being made to appear to the Court that said Administrator has fully complied with said order of the Court in every particular,

NOW THEREFORE, It is by the Court considered, ordered and adjudged, that said estate be, and it is hereby fully and finally closed.

And it is further considered, ordered and adjudged, that said Matt Campbell and his sureties be and they are hereby discharged and released from any and all further liability on the bond of said Matt Campbell as such administrator.

(SEAL) Hugh MacFarland, Probate Judge.

Deposition of

FRANK B. SIMMS,

taken in Topeka, Kansas, on behalf of the plaintiffs, was read in evidence as follows:

DIRECT EXAMINATION.

I am and have been a resident of Topeka, Kansas, about twenty-three or twenty-four years. I knew Ferdinand Fensky in his lifetime. I had more than one business transaction with him.

Matt Campbell was administrator of Ferdinand Fensky's estate. Prior to Ferdinand Fensky's death I never had any dealings with his wife, Jeanette Fen-

sky. I borrowed money from Ferdinand Fensky prior to his death. I had certain dealings with Matt Campbell, acting as attorney for Ferdinand Fensky before the latter's death. I might or might not have had further dealings with Mr. Campbell as administrator after Mr. Fensky's death, but am not certain.

Deposition of

OSCAR KRAUSS,

taken in Topeka, Kansas, being recalled on behalf of the plaintiffs, was read in evidence as follows:

About two years after the death of his mother, Ida Wendt, Conrad Wendt died in Germany unmarried, intestate and without issue, leaving as his sole heirs at law Augusta Krauss, Louisa Pickens, Hulda Richter, Fred Fensky and Johanna Schutt, brothers and sisters of Ferdinand Fensky, deceased, and Charles Fensky, nephew and George Fensky, also nephew of said Ferdinand Fensky, deceased.

Deposition of

RALPH SQUIRES,

taken in Topeka, Kansas, on behalf of the plaintiffs, was read in evidence as follows:

I am the duly elected, qualified and acting Register of Deeds of Shawnee County, Kansas, and as such officer I have custody of the records of deeds and mortgages in the said county. I have made a thorough search of the records and have prepared a tabulated statement showing certain facts relative to deeds executed by Ferdinand Fensky and wife during the lifetime of Ferdinand Fensky; also of certain deeds



executed by Jeanette Fensky after the death of Ferdinand Fensky; also of a deed executed by Matt Campbell, administrator of the estate of Jeanette Fensky, after her death, and of certain mortgages executed to Jeanette Fensky during her lifetime and after the death of Ferdinand Fensky.

The said tabulated statements were offered and read in evidence as follows:

Deeds of Ferdinand Fensky and wife to others as stated.

GRANTEE	CONSIDERATION RECORDED	DATED	FILED	ACKNOWLEDGED
Geo. Lippert	\$660.00 307/623	Apr. 6 '03	Aug. 18 '04	Apr. 6 '03
Jacob Fink	N. ½ 46 and all 48-50 Chandler st. North Fensky's 1st Add. 267.00 307/136	Apr. 6 '03	Apr. 29 '04	Apr. 6 '03
Mollie S. Grant	41-43-45 Lake St. North Fensky's 1st Add. 540.00 307/232	Apr. 6 '03	May 20 '04	Apr. 6 '03
John H. Sell	25-27 Lake St. North Fensky's 1st Add. 715.00 307/240	Apr. 6 '03	May 23 '04	Apr. 6 '03
John Dietz	48-50 Lake St. North Fensky's 2nd Add. 500.00 307/477	Apr. 6 '03	July 15 '04	Apr. 6 '03
John Domme	9-11 Lake St. North Fensky's 1st Add. 840.00 307/476	Apr. 6 '03	July 15 '04	Apr. 6 '03
Grant A. Baxter	12-14 Chandler St. North Fensky's 1st Add. 1160.00 307/30	Apr. 6 '03	Apr. 11 '04	Apr. 6 '03
Henry Frank	28-30-32-34 Lake St. Fensky's 2nd Add. 540.00 307/385	Apr. 6 '03	June 23 '04	April 6 '03
W. L. Havens	1-3 Locust St. North Fensky's 2nd Add. 970.00 301/621	Apr. 6 '03	Nov. 20 '03	Apr. 6 '03
Camille Van Laeys	42-44-46 Lake St. North Fensky's 2nd Add. 800.00 305/13	Apr. 6 '03	Nov. 28 '03	Apr. 6 '03
	51-53 Locust St. North Fensky's 2nd Add.			



Henry S. Preussner	2200.00	351/183	Apr. 6, '03	May 26, '09	Apr. 6 '03
South 25 ft. Lot 71 Kansas Ave. North.					
Wm. E. Gibbons	960.00	322/450	Apr. 6, '03	June 1, '06	Apr. 6 '03
6-8-10 Lake St. North Fensky's 2nd Add.					
Frank Sawyer	430.00	316/284	Apr. 6, '03	May 25, '05	Apr. 6 '03
1-3 Lake St. North Fensky's 2nd Add.					
Andrew Meder	630.00	350/19	Jan'y 28, '03	Feby. 11, '09	Jan'y 28 '03
23-25-27 Locust St., Fensky's 2nd Add.					
John C. Kafton	850.00	301/253	April 6, '03	Sept. 21, '03	April 6 '03
17-19 Lake St. North Fensky's 1st Add.					
Fritz Simon	400.00	301/586	Jan'y. 20, '03	Nov. 13, '03	Jan'y. 20 '03
55-57-59-61-63 Locust St. Fensky's 2nd Add.					

Deeds Jeanette Fensky to others as stated.

GRANTEE	RECORDED	AMOUNT	DATE	FILED	ACKNOWLEDGED
<u>Rudolph Neef</u>					
Quit claim					
South 44 feet, #63 Kansas Ave., North Topeka.	303/153	\$ 1.00	July 9, '04	Aug. 3, '04	July 9, '04
Geo. J. Fensky	326/329	2500.00	July 9, '04	Sept. 5, '06	Sept. 9, '04
South 50 feet #66 and North 4 feet #64 Kansas Ave., North Topeka.					
Rollin R. Teemley	322/221	10.00	Mch. 10, '06	Apr. 25, '06	Mch. 10, '06
North 30 feet of South 50 feet #88 Kans. Ave., North Topeka.					
Fred Volker	322/544	1200.00	May 7, '06	June 15, '06	May 7, '06



#62 and North ½ #64 Quincy St. (South)				
L. W. Coleman	315/440	10.00	Mch. 9, '07	Mch. 19, '07
Grant deed Tract South of lot 63 on Kans Ave., North Topeka.				
L. W. Coleman	315/440	10.00	Mch. 9, '07	Mch. 19, '07
Grant Deed Tract of 10 acres in Survey #5 in Twp. 11 Range 16				

Deeds of Jeanette Fensky to others

GRANTEE	CONSIDERATION	RECORDED	DATED	FILED	ACKNOWLEDGED
Wesley Sager	\$800.00	307/211	May 2, '04	May 16, '04	May 2, '04
12-14-16 Lake St. North, Fensky's 2nd Add.					
Casper Getteg	704.00	321/76	June 20, '04	Dec. 15, '05	June 20, '04
9-11 Locust St., Fensky's 2nd Add.					

Deeds of Matt Campbell, Administrator of Estate of Jeanette Fensky, deceased, to others.

GRANTEE	CONSIDERATION	RECORDED	DATED	FILED	ACKNOWLEDGED
George Hampe	\$1800.00	383/608	Mch. 14, '13	Mch. 15, '13	Mch. 14, '13.
12 acres in Kaw Reserve No. 5					

Mortgages to Jeanette Fensky

Mortgagor	Amt.	RECORDED	DATED	FILED	ACKNOWLEDGED
Geo. Tippet	\$158.00	299/197	Oct. 20, '03	Oct. 26, '03	Oct. '03

Wm. L. Havens & wf.,	672.00	299/227	Nov.	16, '03	Nov.	20, '03	Nov.	19, '03
Camille Van Laeys,	565.49	299/237	Nov.	15, '03	Nov.	28, '03	Nov.	27, '03
Geo. Brosamer	909.00	299/271	Dec.	15, '03	Dec.	21, '03	Dec.	19, '03
Reed Saylor	693.00	299/274	Nov.	15, '03	Dec.	22, '03	Dec.	22, '03
Jno. H. Brosamer	714.00	299/444	Mch.	1, '04	Apr.	25, '04	Apr.	25, '04
Andrew Meder	425.00	229/445	Apr.	25, '04	Apr.	25, '04	Apr.	25, '04
John Domma	815.00	299/518	June	15, '04	July	6, '04	July	4, '04
John Dietz	250.00	299/510	June	15, '04	June	30, '04	June	29, '04
E. H. Stamm & wf.,	101.63	299/291	Dec.	10, '03	Jan'y.	5, '04	Jan'y.	4, '04
Jos. W. Walker & wf.,	895.00	299/261	Nov.	15, '03	Dec.	14, '03	Dec.	12, '03
John H. Sell	910.00	299/476	May	15, '04	May	24, '04	May	23, '04
Benj. S. Dustin & wf.,	238.00	299/263	Nov.	15, '03	Dec.	17, '03	Dec.	16, '03
M. S. Grant	500.00	299/460	May	1, '04	May	9, '04	May	9, '04
Geo. Jammer & wf.,	892.00	299/519	May	15, '04	July	7, '04	July	6, '04
Jacob Fink & wf.,	109.00	299/455	Apr.	15, '04	May	5, '04	Apr.	30, '04
Louis Schaeffler & wf.,	485.00	299/600	Aug.	15, '04	Sept.	16, '04	Sept.	15, '04
F. Gutsch & wf.,	550.00	299/599	Aug.	15, '04	Sept.	16, '04	Sept.	15, '04
M. G. Tracy & wf.,	407.60	299/357	Mch.	1, '04	Mch.	2, '04	Mch.	2, '04
Wesley Sager & wf.,	724.00	299/474	May	10, '04	May	21, '04	May	12, '04
Casper Getteg & wf.,	300.00	221/162	Oct.	16, '05	Oct.	20, '05	Oct.	19, '05
Geo. Hemmrick & wf.,	458.00	310/391	Aug.	1, '04	Sept.	2, '05	Sept.	1, '05
Wm. E. Gibbons	665.00	320/310	June	1, '06	June	1, '06	June	1, '06
Sarah Rost & hus.,	4000.00	320/289	Apr.	15, '06	May	23, '06	May	21, '06
H. S. Pruessner & wf.,	2000.00	333/146	Sept.	1, '07	Sept.	18, '07	Sept.	6, '07

It was stipulated, admitted and agreed that the foregoing statements prepared and identified by the Register of Deeds be received and admitted as evidence on the trial of this cause, and that all objections thereto upon the ground that the statements did not contain full, true and correct copies of the said instruments or that the said instruments were not produced or further identified were expressly waived.

It was also stipulated, admitted and agreed that the following are full, true and correct copies of certain original letters and other instruments in writing to wit: Letters transmitted by mail from J. V. B. Goodrich to M. T. Campbell; letters transmitted by mail from M. T. Campbell to J. V. B. Goodrich; letters transmitted by mail from Mrs. Jeanette Fensky to M. T. Campbell; letters and receipt transmitted by mail from M. T. Campbell to Mrs. Jeanette Fensky; letters transmitted by mail from M. T. Campbell to Minnie Farnsworth; letters transmitted by mail from Minnie Farnsworth to M. T. Campbell; letters transmitted by mail from M. T. Campbell to A. M. Jackson, Frederick Fensky, Johanna Schutt and Charles Fensky; all as indicated by addresses and signatures thereon. The same were offered and received in evidence. The exhibit numbers are the numbers endorsed thereon at the taking of the depositions in Topeka, Kansas, hereinbefore set forth. The said letters in full are as follows:

## Exhibit 2.

San Pedro, Cal.

September 4th, 1903.

M. T. Campbell, Attorney at Law,

Topeka, Kansas.

Dear Sir:— I have been requested by Mrs. Jeanette Fensky, widow of the late Ferdinand Fensky deceased, to write you in relation to matters pertaining to the estate of deceased. Mrs. Fensky has employed me to act as her Attorney in the settlement of the estate and having a great deal of confidence in you, she wishes you to act as the Administrator of the estate to settle up and Probate the Property which is in the State of Kansas. Mr. Fensky died here in Los Angeles County California. He died intestate, or at least no Will can be found.

An Administrator has to be appointed here also, to settle up matters here.

Now Mrs. Fensky wishes to have you act for her in adjusting all matters pertaining to the estate in Kansas; And she wishes me to write and ascertain the approximate cost of putting the estate through the Probate Court there, so far as the Kansas property is concerned; I tell her that no one can tell beforehand just what the cost may be in Probateing an estate, but she wants to know approximately so I told her that I would ask you the question; I see that your Laws in Kansas are more liberal with the widow, than the Laws of California are, when the husband dies intestate, and without issue; and so if possible we wish to have all of his property which is located in the



State of Kansas, distributed there under the Laws of your State.

You of course, (having done business for the deceased for many years in his life time) know about how his matters stand there in Kansas, and if you will take hold of the matter there I think that we can all work pleasantly and harmoniously together.

If you will write me just what you want we should do ~~her~~ here, to help the matter along, we will try and respond at once; I presume that you will need a petition signed by the Widow for the appointment of an Administrator there. And if you will draft the petition and send it here, I will see that it is properly executed, and when the Administrator is appointed Mrs. Fensky will send on all of the papers, which pertain to any and all property in Kansas.

Mr. Fensky died on the 7th of August 1903. He died without issue and his next of kin are his brothers and sisters and the children of deceased brothers and sisters; the names of these you can get from his relatives there at Topeka.

There is no doubt in my mind that Mr. Fensky intended that all of his property should go to his wife, for he had talked to me on that line several times, before his death; but he put off making a Will.

Hoping to hear from you soon,

I am Yours Respectfully –

John V. B. Goodrich  
Attorney at Law.

San Pedro,

Los Angeles, Co. Cal.

## Exhibit 3

8th Sept, 1903

John V. F. Goodrich,  
San Pedro, Calif

Dear Sir:—

I have received your letter of 4th inst. in regard to Fensky estate and am glad Mrs. Fensky has consulted a lawyer about her interests as it is important that she have the right kind of advice in the adjustment of her affairs. I am sorry "Fred" did not give her everything by will and am really surprised that he overlooked or rather neglected so important a matter till too late. It was not like him to do it. Of course his real estate here will go to her under our statutes, but I suppose all his personal property, which will include all notes and mortgages, will descend under the laws of California. Is not that your understanding?

An administrator here is quite necessary in view of the many mortgages and land contracts he left, but as he left no debts it is not at all likely that the administrator as such will have to sell any of the real estate. It will need attention however, and if the administrator can act in the capacity of agent generally for her it would simplify matters and perhaps be less expensive. I hardly know how to answer your question about the costs of administration—some of the mortgages will doubtless have to be foreclosed or in some way converted into money, so that proper distribution may be made among the heirs. No one can foresee whether there will be any contests or not, but

so far as my compensation is concerned, I think the fairest way to adjust it would be on the basis of a percentage of the money passing through my hands -- some of it will come easily -- some of it, and, under the circumstances, perhaps much of it not so easily -- but at all events it will require much care and attention, and the knowledge of "how to do it", and it seems to me now that five per cent would be reasonable if we take chances on determining the matter beforehand. I suppose I can go to the Court and be appointed administrator on the strength of your letter and my own request, and possibly I may do so, as since I commenced writing this letter a mortgager has called (Mr. Stoker) and says he has sold the mortgaged property and has now gone to bring the purchaser. Should the purchaser pay down the whole price which I think he will, he will want the mortgages discharged of record and as soon as I am appointed administrator I can do so. You might however have Mrs. Fensky make and return the enclosed affidavit in case I should not request appointment till it returns.

Give me your views of Mrs. Fensky's relation to the land and lot contracts for deeds. If she is now the sole owner of the lands and I think (without investigating the question) that she is, ought she not either to make new contracts in her own name or give deed and take back mortgages for balance of purchase money?. In most cases I think there has been enough paid so that the property will be good security for the balance and make the mortgage saleable should she

desire to convert them into money to be invested in California.

Right here John C. Kafton called for an abstract of title to his lots saying he wanted to pay up his contract and get his deed. The deed for his lots is now in the Citizens' State Bank made (signed) by Fensky and his wife some months ago, but the bank has no abstract of title. See that one is sent to the Bank or to me for him at once and also the Insurance Policy. He has sold or rather bargained his lots and can't make his payment till he gets the money from his purchaser.

Is it at all probable that the brothers and sisters will make any claim to the contracts for deeds for property here? As soon as I am appointed administrator, I will be besieged and I want to know your views on some of these important questions before expressing my opinion. I am quite willing to act for Mrs. Fensky and will try to treat her fairly in my charges and will be governed largely by your judgment as to what is fair and right.

Respy,

M. T. Campbell

Exhibit 4

JOHN V. B. GOODRICH, Attorney-at-Law  
San Pedro, Cal., Sept. 14th, 1903.

M. T. Campbell,

Topeka, Kansas.

Dear Sir:— Yours of the 8th inst. is at hand, I am glad to learn that you will act for Mrs. Fensky in the settlement of her late husband's estate so far as it



pertains to property located in the state of Kansas; Mrs. Fensky of course wishes you to act as her agent there, as well as to be the Administrator of the estate, she thought that five per cent would be rather high, but I told her that you were taking chances on determining matters before-hand in fixing a stated amount, as your compensation; so I told her that she had better let the matter of compensation rest until you have wound up the settlement of the estate there; and that I did not think that there would be any difficulty in adjusting the matter of your compensation.

You ask me to give my views of Mrs. Fensky's relation to the land and lot contracts for deeds; My opinion is that Mrs. F. under your laws is now the sole owner of said lands and that the Probate Court under proper petition should assign said lots to her, subject to the written contracts for the sale of the same, by deceased in his life time; Or in other words I can not see under the laws how these several lots can be treated as personal property and distributed as such: In my opinion they should all be assigned by the Probate Court of your County to Mrs. F. subject to the contracts for the sale of the same, provided that the contracts are recorded in the Registers office of the County in which the lands are located; And if said contracts are not so recorded, (*Prima Facie*) under the law so far as the record is concerned she would be the real owner of said lands, the link in the chain of title between the deceased and the widow being supplied by the assignment of said lands by the Court to Mrs. Fensky.

Now in relation to Mrs. Fensky executing new deeds, and taking back mortgages, I do not know what your law is upon the point where the deceased in his life time had entered into a written contract for the sale of lands, but in many of the states, the Executor or Administrator is empowered to execute the deeds to the purchaser when the conditions of the contract are complied with without an order of the Court. If this is the law in Kansas and especially if the land contract have been recorded it would seem to me that the legal Representatives of the estate, which in this case would be the Administrator would be the proper person to execute the deeds under the contracts: Yet it may be that the deeds which were placed in escrow in the Bank there, which were executed by Mr. Fensky and wife, will be sufficient to cover the case; This matter is all left in your hands to look after, you have the Kansas law, and I am fully satisfied as is also Mrs. Fensky that you are thoroughly conversant with it. And also the discretion that is in the hands of your Probate Court to favor the widow in an estate of this kind.

In relation to all of the notes and mortgages against Parties in your place, they will have to go on the inventory here as personal property (as the deceased) lived here at the time of his death) but the notes and mortgages against Parties living there will have to be placed in your hands for collection; You know all about these matters and when you need any papers or information that Mrs. Fensky can give you, she is

ready at all times to send such papers, or give such information.

In relation to the abstract of title of the land of John Kafton that abstract is in a trunk at Mrs. Fensky's old home at Topeka, and Mr. F.'s niece who has the key to the trunk is here, but will return to Topeka the last of this week and you can get the Abstract then.

Enclosed you will find the Affidavit of Mrs. F. which you sent here to be executed by her. I also send you all of the Policies of insurance upon several buildings which will have to be looked after, I send these under a different cover.

In relation to the brothers and sisters making any claim to the contracts for deeds, Mrs. F. says that she can not tell what they will do: But so far as the Personal property is concerned and also the land here I have advised her to compromise with them and get their receipts in full for what interest they may have in the estate. If you have any suggestions to make along the line of such a compromise, please do so, and assist us in bringing the same about.

Respectfully

John V.B. Goodrich

Exhibit 5

San Pedro, Calif. Sept. 16, 1903

M. T. Campbell, Esq.,

Topeka, Kansas.

Dear Sir:— Herewith I send you Sims note which is secured by Chattel Mortgage. Will you please see

that the Chattel Mortgage is renewed before it expires?

Mr. Campbell, Sims went to work without consulting us regarding repairs, after the flood, on the laundry -- we are suspicious of him bringing in a much larger bill than he should. Will you kindly investigate? Also see that he pays his rent promptly, both for laundry & residence.

Very respectfully, Yours,

Mrs. F. Fensky.

By Minnie.

Exhibit 6

18th Sept. 1903

John V. B. Goodrich

San Pedro, Calif.

Dear Sir:--

Just now received your of 14th instant with Insurance Policies.

I agree with you that the land contracts for deeds are not personal property, but that Mrs. Fensky is the sole heir at law and now the sole owner in fee of all the Kansas real estate, including that contracted to be sold but subject of course to debts, if any, of deceased, and the rights of contracting purchasers. And thus we will treat the matter. And in that view of it, it will be necessary for you to send me all the agreements for deeds, as I must inventory all the real estate as well as all personal property under my control within sixty days from my appointment. As I said in my last, there will be no occasion for me to sell any



of the real estate as administrator, because we know Mr. Fensky left no debts to pay and of course no claims will be filed against the estate. Inasmuch then, as Mrs. Fensky is the sole heir of all the Kansas real estate, and there is no danger of any of it ever having to be sold to pay debts of deceased, it seems to me now the wise thing for her to do is either to make new contracts for deeds in her own name or as I suggested in my last (where enough has been paid on contract) give purchaser a deed and take back a mortgage for balance due. So far as the real estate here is concerned she became the absolute owner in fee of all of it on her husband's death and without reference to any Probate proceedings or whether an administrator was appointed or not can do as she pleases with it, subject all the time and only to the claims of creditors -- and we all know there are no creditors.

Our Statutes give creditors three years within which to file their claims against an estate, but Mrs. Fensky need not wait that long to sell any real estate here for we can easily satisfy any purchaser that she is the sole heir and that there are no debts that the real estate will ever be liable for. She is therefore the one to sell and not myself as administrator. I was appointed several days ago on the strength of your letter, in order to satisfy of record the Stoker-mortgages which were in my hands for collection and which it was quite necessary should be discharged at once. One mortgage was for \$2500 and the other for \$1285 and I gave bond for \$8000. I suppose it will be necessary

for me to include these mortgages, or rather the proceeds from them, \$4297.14, in my inventory in the Probate Court, and if so, of course you will not inventory the same there. And, by the way, the thought just now occurs to me, how am I to treat the notes and mortgages you will send me for collection? Will I collect them as administrator and make report to the court here, or simply as agent for the California administrator? In the latter way, I suppose and hope, but let me hear from you on this point. Our statute provides that mortgages may be discharged of record by an entry on the margin signed by the mortgagee or personal representative. That is the way I discharged the Stoker mortgages. Now if I collect the notes and mortgages you send me as agent for the California Administrator I will have to send to California for the discharges. If I collect them as the Kansas Administrator of the estate, I can discharge the mortgages as the personal representative of deceased, but will I not have to account to our court for all I so collect? You will perceive I am not stopping to investigate these questions now, but simply suggesting them as they occur to me for your consideration and want your views on them as we go along. It looks now as if this \$4297.14 that happened to be in my control will have to be administered upon and distributed here. If it had not been for these Stoker mortgages in my possession my bond as administrator would have been but nominal, as I could not steal the real estate. However, I have an excellent bond -- Thomas Page and E. C. Arnold being my sureties --

and I guess the interested parties will not lose any sleep over the matter on that score.

Several parties have come to me of late to pay money on their notes but I have told all thus far that I had no authority to receive it. And now when I do accept it I ought to have the paper here to make the proper indorsements. So consider the propriety, as soon as you have filed your inventory there, of sending all the Kansas paper here for collection with full instructions about the capacity in which you wish me to collect it. It will be right inconvenient to send out there for notes and so forth in each individual case.

I think your idea of having Mrs. Fensky buy out the other heirs a good one. It will simplify matters and shorten up the proceedings. In the petition for my appointment here nothing is said of any other heirs besides Mrs. Fensky. I thought it time enough to call attention to brothers and sisters when it was fully determined whether or not there was anything here to "distribute" to the brothers and sisters. I rather think this money in my hands will have to be so distributed if Mrs. Fensky does not buy them all out, but nobody is "holding them" from making their wants known if they are entitled to any of it. I told Oscar Krauss the other day that I might call on him for the names of all the brothers and sisters some of these days. But there is no hurry. I learned from him, however, what I did not know before that Mr. Fensky had a brother in Germany. It seems there are three sister, three brothers, and one nephew; seven in all. I could negotiate all right with those here --

Mrs. Krauss, Mrs. Pickens, and the nephew George. They are all good friends of mine and will believe what I tell them, I think. Some one told me lately that the brother in Germany died recently, but I am not sure about it. If he is dead and left minor children it will complicate and delay matters some, I suppose Mrs. Fensky will know about him.

The property in North Topeka is in need of repairs on account of damage done by the flood, and parties are "after me" to do something ~~of~~ about it already after seeing notice of my appointment. It has been quite cold here the last few days and Sims the laundryman, who lives in the brick house, says if he does not get his doors shut so that he can keep warm he will have to move. The flood swelled everything out of shape and ruined much plastering and it will be absolutely necessary to make repairs before people will live in the houses. Sims has spent a good deal in repairing the laundry building and I must have an accounting with him before I can tell how he stands with reference to the estate. Mr. Morse the contractor, who rebuilt the wall on another store building that was badly wrecked by the flood, dunned me the other day for the balance due him—something over \$100 I think -- but more about these matters peculiar to the flood damages later on. I suppose Mrs. Coughlin has given Mrs. Fensky some idea of them.

Going back to the land and lot contracts: I am satisfied that none of them are recorded. The parties who hold duplicates are all in possession of the property they contracted for and there was and is no need



for them to record the contract to protect their rights. The public records therefore show F. Fensky to be the owner in fee of all the property and a deed from his sole heir will convey a good title. And my advice ~~advise~~ is if said sole heir does not intend to come back here to Live, to sell off all property here and invest nearer home. It will never pay her to hold property here to rent.

Be sure to send me as soon as possible all the deeds of the ~~pro~~ property the Fensky estate still owns, and also the lot contracts or at least the descriptions from them, so that I may make my inventory for the court complete within the time allowed by law. I ought to have all the lot and land contracts, which, as I have said before, we will treat as Mrs. Fensky's sole property, so that I may be in position to negotiate with the other parties promptly. .

I am confident none of them will put their contracts on record if I advise them not to do so.

Hoping to hear from you as soon as convenient and assuring you that you will receive prompt replies to your letters whenever required, I am

Yours respectfully,

M. T. Campbell.

Exhibit 8

San Pedro, Calif.

Sept. 24th-1903.

Mr. M. T. Campbell,  
Topeka, Kansas.

Dear Sir: --

Yours of the 18th inst. is at hand. And in reply I will say that I fully agree with you in all of the

matters that you have investigated and decided upon; but in relation to the distribution of the Personal Property there seems to be some question arising that I wish you would investigate so far as your laws and decisions of your Courts go: Our law here and the decisions of our courts upon this matter is that all of the personal estate of the deceased, must be inventoried in the County where the deceased lived at the time of his death.

Now the question comes up if we are compelled to place all of his personal property upon the inventory here, would not the Probate Court here have the distribution of the personal property, (the same to be distributed under the laws of this state). Of course we cannot differ in our opinions in relation to which of the state laws the personal must be distributed under. We both say that it must be distributed under the laws of the state, (I wish it was otherwise) where the party lived and died. Now the question is "can the Probate Court in your county distribute personal property under the laws of California," if not then all of the personal property, when *converted* into money or its equivalent will have to be sent to the Administrator here so that the same can be distributed here.

Now Mr. Campbell please look this matter up and if you find that your Court there has full jurisdiction over the personal property of the estate of the deceased, let me know this fact and then it will not be proper for us to inventory the personal here. We have not made the petition for the appointment of an Administrator here yet, as in such a petition here, we

have to describe the property the same as we do in the inventory which is afterwards submitted to Appraisers. Mrs. Fensky will sign our petition for the appointment of herself as the Administratrix of the estate and we shall make that petition as soon as we find out definitely where to place the personal property.

We do not care which Court distributes this personal estate, only that it is done properly so that there can be no fault found by the parties interested herein: Of course it will be best for you to sell and assign all of the mortgages, as the Administrator of the estate there; As it would be an endless bother to send here for an assignment or discharge of mortgage in each case.

I will send you the papers as fast as Mrs. F. can get them ready, she has been feeling rather poorly since Mr. F.'s death, and we have to proceed rather slowly with the matter, but she is gaining some now. She says that she wants you as Administrator to go to the Bank and get what money there is paid in upon the contracts and send to her and she will receipt for the same, she says that she needs some money, and I do not suppose that the Bank would send it to her, as it would not be proper for them or her to do any business of that kind outside of yourself as the agent for her or as the Administrator of the estate. And as there is no question but that Mrs. F. is entitled to the money upon these contracts, I can see no reason why the money could not be paid to her. I will enclose you under separate cover the contracts for deeds, and you can put them in your inventory. And you can also

take up the deeds which are in escrow in the Bank and you can make out new deeds and send them here for Mrs. F. to sign and acknowledge, and in those cases where the parties can not pay up take back mortgages as you suggested or if you think best in some cases where enough has not been paid on the contract to justify the taking back of a mortgage, send on a new contract for her to sign.

You say that on the death of Mr. F. that the lands belonging to him at the time of his death vested in Mrs. F. under Kansas laws without reference to any Probate proceedings; while this is true so far as the law is concerned: Yet would she not have to Probate the estate in order that she might have a Record title to these lands, in other words, would not the Court have to assign the real estate to her (under proper proceedings) either at final distribution or by a determination of the heirship of said estate in order that the same might go upon the records and supply the link in the chain of title, upon the records.

Mrs. F. says that she does not understand about the Morse debt of over \$100.00 she says that they sent Mr. Kimmerly money to pay for the building of the wall, but you will have to use your best judgement in these matters.

Mr. Fensky has a sister living in Germany it was his sister's husband who died and not his sister.

We will get the notes and mortgages together and send them to you as soon as possible: We will send you the names of the heirs at law if you cannot get them here.



Mrs. Fensky just came into my office and says tell Mr. Campbell that I want he should hurry up as fast as he can as she wants to close the estate as soon as she can, she brought in the contracts for sale of real estate and there are 29 of them they are so heavy that I guess I will send them by express; there are three or four of them that the parties do not pay much on, and she thinks that it would do no good to give a deed on those three or four, and take back a mortgage but that it would be better in those cases to get the parties off from the lands.

I will send you the notes and mortgages in a day or two. I think I will send them by express also.

Yours with great Respect.

John V. B. Goodrich.

Exhibit 9

28, Sept. 1930

John V/ B. Goodrich,

Dear Sir:— Have just received yours of 24th instant and am clearly of the opinion that the California Court must take jurisdiction of all the personal property of deceased within your state at time of death and that distribution must be through your court. If no administrator had been necessary any place else than in your county then all the personal property wherever located would have to be inventoried and distributed through the California court: but on account of the necessity of an administrator here I am equally clear under our statutes that the Kansas administrator must make an inventory of everything belonging to the

estate in this jurisdiction at time of death, and administer the same according to the law of the state governing the distribution of decedents personal property—in other words according to the law of California. If I am right about this I must inventory the Stoker mortgages or the proceeds therefrom because they were in my hands at time of Fensky's death. Had any one else been appointed I would have had to turn them over to him. I am therefore chargeable as administrator of his Kansas estate for the Stoker money and I being so chargeable the California administrator should not be. I think however in due time, instead of my holding the fund for distribution here I can make such a showing to our court that it will authorize and direct me to send the money to the California administrator and thus relieve me and my bondsmen from further responsibility on account of it. I feel sure that our court would not have jurisdiction of any other personal property than that within its jurisdiction at time of death of deceased. It is "up to" the California administrator therefore to inventory and distribute all the balance. And my connection with it will be only as attorney for or agent of such administrator. I hope you will hurry the appointment so that when I collect on a note belonging to the estate I may give receipt in name of California administrator. When I collect rents, or proceeds from sale of real estate I will give receipt in name of J. Fensky, owner, by her agent M. T. Campbell.

When I said that Mrs. Fensky could do as she pleased with the real estate here regardless of probate

proceedings I did not mean that we would not go on through the probate court, but only that she was perfectly safe in making a deed to any property here as sole owner thereof (if any one would accept it) because we all know that Fred left no debts that such property could ever be liable for. I think with you that it is best to have a record made that she is the sole heir and that there are no debts that can ever be a lien on the real estate, But she must remember that our law gives creditors three years within which to present their claims and that we must wait at least a reasonable time before asking for my discharge and a closing up of the estate or the record would be of little avail to her. Purchasers would naturally note the fact that there was still time for claims to be filed against the estate and if they rely on the record would hesitate to buy for the same reason that they would hesitate to buy now, to wit:— that there might be claims filed against the Fensky estate that the real estate would be liable for.

We could satisfy some people by outside evidence that she was (is) the only heir, and that deceased left no debts and they perhaps would be willing to take a deed regardless of any administration of the estate. and if any such “apply” she can safely sell, but nevertheless we will go on here and close up the estate in probate court in due season and make the record that will do away with the necessity for such outside evidence.

If I am correct in my views I will have to do as administrator only with the real estate and the Stoker money. With the former only to make a public record that Mrs. Fensky is the sole owner and that there are no debts against the estate, and with the latter to see that it is distributed among the heirs under the California law or sent to the California Administrator under the order of our Court. The last I much prefer to do if I can thereby as well protect myself and my Bondsmen.

As Agent then of the California administrator I can collect money due the estate and report to such administrator: and as agent for Mrs. Fensky can sell and rent her real estate and report to her in her individual capacity for proceeds. And that reminds me that her niece Mrs. L. Coughlin says that "Aunt Jennie never wants to sell the old homestead, but wants her to look after it", and so forth. Now if Mrs. Fensky intends to keep that property and it is more satisfactory to have Mrs. Coughlin take charge of it I will be glad to be relieved of all responsibility in regard to it. I think her niece can manage it as well as or better than I can and possibly the Sachse-place also. The only drawback I know of now to such an arrangement is the fact of a little friction between Mrs. Coughlin and the tenant Simms, but rather than let that interfere Mrs. Fensky might direct that Mrs. Coughlin have sole charge of the old homestead property except the part occupied by Simms, and I would look after that. The laundry property will require many repairs to make it useable for the winter. Should Simms



vacate it it would lie idle doubtless for a long time. If he will make the necessary repairs and take credit for them on the note he owes, that is the way to do it. He says he sent Fred a statement of his expenses to put the place in shape to move back into it, a short time before Fred died, and that Mr. Fensky besides that amount allowed him three month's rent, which I understand him to be July, August and September. So I expect to begin collecting rent from him for October. Don't forget to call Mrs. Fensky's attention to the matter of Mrs. Coughlin taking charge, full charge and control of the home place, except the Simms rent, and if it suits her to do so let it be so distinctly stated that I may feel no responsibility further about it. I don't know what she wants to keep it for if she does not intend to live here again.

I will follow instructions about the money in the bank and report soon. I have no doubt they will pay it over to me on my receipt for same. I sent Mrs. Fensky check for \$100 recently on the strength of what Mrs. Coughlin told. I will send such a receipt as I think she should sign and if it meets your approval have her sign and return it. I hope she will take no steps in any of her business matters without consulting you. I sometimes fear she will have too many advisors among her kin folks.

In regard to the Morse claim, I guess Kimmerle was "short" that amount in his payments to Morse, but he will no doubt account for it all right to Mrs. Fensky and I have left the settlement of the Kimmerle matter with Mrs. Coughlin who seems to think it will be all

right with Mrs. Fensky. Before I pay Morse, however, I will see Kimmerle and see that the claim is all right.

Time enough for me to have the names of the "heirs" at law" after it is determined whether or not the Stoker money must be distributed here or whether I may send it to the California Administrator to distribute.

You say you will send the notes and mortgages soon, but I hope not before you have made your inventory of them. Let me know soon what Mrs. Fensky thinks of selling out her property here and what price she will ask for it.

Can she cash my personal checks there without cost to her? I hope she can (as I can do here) as it will be much more convenient for me. I hope she will not get impatient at the "laws delays". This matter can't be "rushed" with safety to her interests and I fear there are many disappointments in store for her before the "estate is closed" on account of her inexperience in such matters, but I will do the best I can to have the business move along to a successful termination.

Yours respectfully,

M. T. Campbell

Ps. -- It is barely possible that the Stoker money, being a part of the Kansas estate at the time of Fensky's death, may be distributable according to the Kansas laws instead of the California laws, I must investigate this further before we definitely determine what course to pursue in regard to it.

M. T. Campbell.

## Exhibit 11.

(Post Card)

Mrs. Fensky:-

Did not Fred give you the Stein notes before he died? If so, they do not belong to the estate and should not be inventoried as part of the estate. Any notes that he turned over to you whether he indorsed them or not are your separate, individual property and you must be sure and call Judge Goodrich's attention to all such cases so that he will not put them in as part of the estate. See? No one here is making any claim and no one has said word to me about the estate except Geo. and I think he will be entirely reasonable. I wish you could sell the real estate here to the other heirs. Talk it over with your lawyer and let's see if we can't make such turn. Who owns the Sachse place?

C

2nd October, 1903.

Mr. Goodrich,

Just this morning received the package of notes, mtgs, abstracts of title and Ins. policies sent by you, & write simply to inform you of their ~~and~~ safe arrival. Received also a letter from Mrs. Fensky returning unindorsed and of course uncashed check of

H. M. Phillips to <del>Fred</del> Fensky for	\$8.75
and my check to him for Gibbons col. for	12.50

making total of	\$21.25
-----------------	---------

for which find my check payable to Mrs. Fensky. I suppose I can get the money on the Phillips check all right. The Citizens Bank wants to wait till after

the 1st of this month before it prepared its statement and hand over money and papers in its hands. & I have not been over since to get the same, but will do so soon & then report to you.

Respy,

M. T. Campbell.

Exhibit 14

San Pedro, Calif.

October 5th-1903.

M. T. Campbell,

Topeka, Kansas.

Dear Sir: --

Your letter of the 28th inst. is at hand. And I have been talking with Mrs. Fensky and in as much as I have sent all of the papers to you pertaining to the personal property of the deceased which had to be collected there in Kansas, I think that you had better list the same in your inventory, and have the Judge of your Court distribute the same under the laws of California by giving the widow one half and the other half to the brothers and sisters of deceased. Then no one can find any fault. If we do not take this course it will make a great deal of trouble for both you and myself. If your Judge of Probate does not wish to make the distribution of the personal estate under the laws of California when you have collected all of the same and make your final report to your Court as Administrator then he could direct you to turn over to the Administrator here to be distributed here by an Order of this Court, and in such a case, we can make out and file a subsequent inventory here, with the total



amount of personal collected there. But we desire that you list all of the personal with the real estate that is to be collected there upon your inventory, with the full understanding that the personal shall go one-half to the widow and the balance to the other heirs at law, except as you say "the Stoker money," which it seems to me that your Court should decide belongs to Mrs. Fensky in full as the evidence of indebtedness (which is the note) together with the lien to secure the payment of the same were not in the hands of the deceased or in this State at the time of his death, but, of course, you will look this point up and act in harmony with that which is right under the law.

We have made a petition here for the appointment of Mrs. Fensky as Administratrix the appointment will be made on the 15th of this month. I sent you all the notes and mortgages and other papers by Wells Fargo express last week. Mrs. Fensky says that she wishes you would let Laura look after the old home and let her collect the rents and pay the same over to you each month, which she says amounts to about \$28 per month. She says that she does not wish to sell the old home at present.

Your personal check can be used here by Mrs. F. as you suggested. I enclose you check of Mr. Fensky given to Mr. Sims and paid by the Bank there of \$100.00 it will explain itself.

Now Mr. Campbell as I have said in other letters to you, use your own best judgment in all these matters, and I am satisfied that it will all be right yet. I am satisfied in my own mind that it will be best for

all parties concerned and save much trouble and expense for you to list all of the real property located there and the personal property ~~oo~~ collectable there upon your inventory as Administrator and then as before stated, let the personal be distributed one-half to the widow and the other one-half to the other heirs at law.

Yours Respectfully,

(Signed) J. V. B. Goodrich.

Exhibit 15.

San Pedro, Calif.

October 6th-1903.

M. T. Campbell,

Topeka, Kansas.

Dear Sir: -

I received your letter of the 2nd inst. with your check of \$21.25 which check I gave to Mrs. Fensky. In relation to the Stien notes, Mrs. Fensky says that they were made out in her name last July. Now in relation to the Saxie property, Mrs. Fensky says that she and Mr. Fensky had a talk about it a short time before his death, and it was his wish that Mrs. Carrie Neff, daughter of Mrs. Saxie, be given the property. She says that Mr. Fensky received from the rent of the property, all that h he had paid out upon it and now she wants to quit-claim all of her interest in it to Mrs. Neff and she wants you to write to Max Neff, husband of Carrie Neff, who is a Brewer at Denver, Colorado, and so inform him. Mrs. F. says that she wishes you would see all of the heirs who are living there and see what you can do with them about taking

lots there now owned by her in payment for their interest in the estate. She would be willing to make such shifts with the property there except the old home which she says she wants to keep for the present. Jack Kull place is paid for in full Mrs. F. says that Mr. Fensky gave him a deed of it last Spring. I enclose you some deeds you will see that I marked one on the back in pencil showing that a portion of the land therein described was sold some time ago.

Respectfully yours,

(Signed) J. V. B. Goodrich.

Exhibit 16

John V. B. Goodrich

Oct 6, 1903

Dear Sir:—

I went to the Citizens State Bank yesterday and got statement of account with Fensky, which herewith send you, and which shows a balance (after deducting its charges of \$2.25) due Fensky of \$942.82, of this amount I think \$913.57 belongs to Mrs. Fensky and \$27 to the Fensky estate, and therefore took drafts payable to her for the \$913.57 which find enclosed, one for \$886.57 and one for \$27 and I took draft payable to myself for \$27, which also find enclosed, duly endorsed by me, payable to the ad'r of the Fensky estate, and I authorize you to insert the name of said Ad'r. The reason the other fund is drawn into two drafts is because of a mistake made yesterday in our calculation. Please have Mrs. Fensky sign and return the enclosed receipts & if ad'r is appointed have order signed as the bank desires something to show that it was right to pay the money over to me. I made my

receipt for the \$27 show that it was for the ad'r. of the Fensky estate but I did not sign it as ad'r. myself. My theory is that I am acting for the California ad'r and I hope he or she is already appointed. I hope also that Mrs. Fensky will keep the money on the land contracts intact, till we see whether or not the heirs are going to make any claim that those contracts are personal estate. I am going to use the deeds made by F. & wife as far as possible, in order, the more effectually to eliminate that personal property question. The record will look all right and will tell nothing about the time the deed was delivered. I want to take mortgages back to Mrs. Fensky in all cases where the margin makes the property good security for balance due. Mrs. Coughlin stopped me on my way home last evening to tell me Mr. Krauss was consulting lawyers that *the* he was going to see that the sister in Germany, Mrs. Pickens and his wife got their shares, that I should be removed, etc. etc. I asked her where and how she heard all this, and she said Krauss told "Tom" her husband.

Now I am confident this is all "wind" Tom has simply allowed his imagination to get away with his judgment. I know I have had the confidence of Krauss and his sister Mrs. Pickens for many years and had the matter of the appointment of an ad'r have been left to them they would have chosen me.

I only refer to the matter to show the possibility of a difference of opinion between us and the "heirs" in regard to the land contracts. Should any of them ask me about the matter I intend to tell them that you and



I have decided that the California Court is the proper tribunal to make distribution & that in due time they will be allowed their shares through that court. I will only inventory here the Kansas real estate & the Stoker money. And the latter I expect in time to get an order from the court here to transmit to the Ad'r there. I hope for an answer soon to my last in which I suggested that Mrs. Fensky let Laura have entire charge of the home place except the collecting of the Simms rent.

Respy,

M. T. Campbell

Exhibit 17

Mr. Goodrich

I write simply to acknowledge receipt (this moment) of yours of the 5th inst. And while it changes my plans materially will follow your directions and list in my inventory the notes and mtges belonging to the estate. I supposed that they would necessarily have to go thro' your court and did not see the need or propriety of putting them thro' both courts. But you are in a better position than I to judge of ~~th~~ this matter and I shall act as you direct.

I don't think the estate has anything to do with the old home place & as there is so much repairing to do on it I wish Mrs. F. would just let Laura fix it up, keep an acc't of everything & then report directly to Mrs. F. -- anyhow all except the simms rents. I will take care of that to avoid trouble between them. They don't "gee" well & I don't want to "take sides". Am

going to fix up the laundry & try to have the expense paid out of the Simms-note.

Campbell, 8th Oct. 03

Exhibit 18

Oct. 12, 1903.

M. T. Campbell,  
Topeka, Kansas.

Dear Sir:

Your letter of the 6th inst. with the three drafts, one of \$886.57 and the other two of \$27 each, are at hand, also the Bank statement. I have made a memorandum of them and turned them over to Mrs. Fensky. Enclosed you will find Mrs. F's receipts covering the two drafts of \$886.57 and \$27.00 and just as soon as she is appointed administratrix here which will be on the 15th inst, she will sign the other receipt of \$27.00 and return it to you. She will also sign the request which you sent for the bank to turn over everything to you which may be in their hands belonging to the estate. This will be done as soon as she receives her appointment as such administratrix.

Yours truly,

J.V.B. Goodrich.

Exhibit 19

San Pedro, Cal., October 17th 1903

Mr. M. T. Campbell  
Attorney-at-law,  
Topeka, Kansas.

Dear Sir:-

Mrs. Fensky received her appointment as Administratrix of the estate of Ferdinand Fensky, deceased,

yesterday, and enclosed I send you the receipt for check of \$27.00, money belonging to the estate: also the request signed by Mrs. Fensky for the Bank to pay over to you the amount in its hands etc.,

There is nothing new transpiring here.

I shall make out an inventory of just the property that is here and file it in our court.

Very truly yours,

John V. Goodrich

Exhibit 20

Box 1804 - - San Pedro, Calif. Oct. 21, 1903.

M. T. Campbell,

Dear Sir:-

I have sent you the Sims note some time since, to have chattel mortgage renewed, and haven't heard whether you received same or not. Please let me know. I found a P. Card from Citizens Bank stating Mrs. Houschild wished to pay off the mortgage in April or May and on account of flood we did not receive statement from Bank for the month of May; therefore do not know if she has paid it or not. The papers had been forwarded to the Bank.

Have you found the George Stoker note which was in the Bank?

Have you insured all the properties upon which insurance had expired? None of the insurance Policies which I hold here expire until next y year and I will let you know in due time. If either George Fensky or Louisa Pickens want the Quincy St. property for their share, all right, we will let it go that way -- and the laundry also we will let go that way.

Mr. Campbell please see that Gibbons pay \$12.50 each month also their last years taxes, otherwise they will get so far behind we will have to take the property.

Yours Respectfully,

Mrs. F. Fensky.

Exhibit 21

San Pedro, Calif.

November 2nd-1903.

Mr. M. T. Campbell,  
Topeka, Kansas.

Dear Sir: --

Your letter of the 28th ultimo is at hand, and in reply will say that when you take out an additional bond, I should do as you suggest that you will do, take it out in a Surety Company. I did the same thing for Mrs. Fensky when she was appointed Administratrix of the estate. The amount that it costs will be a proper charge against the estate.

Enclosed you will find the following insurance policies on the Fensky Addition:--



<u>Company.</u>	<u>Policy No.</u>	<u>Insured.</u>	<u>Amount.</u>
Norwich Fire Union	3,531,622	Geo. Brosamer	\$1,500.00
Shawnee Fire Insurance Co.	95,638	Frank J. Gutsch	650.00
Farmers & Merchants Ins. Co.	100,062	E. H. Staim	500.00
Continental Ins. Co.	3,974	Jacob Fink	600.00
" "	3,973	M. G. Tracy	800.00
Shawnee Fire Ins. Co.	086,316	Mrs. W. S. Grant	400.00
Continental Ins. Co.	4,139	Frank Sawyer	300.00
Farmers & Merchants Ins. Co.	41,713	Geo. Henrick	500.00
Delaware Insurance Co.	611,507	Louis Schaefer	750.00
Continental Insurance Co.	4,138	Morris Sawyer	500.00
Delaware Insurance Co.	611,536	Robert Nightingale	735.00
" "	611,563	Mike Etzel	500.00
Spring Garden Ins. Co.	1,282	Reed Saylar	700.00
Delaware Insurance Co.	635,616	F. Fensky (Walker)	900.00
American Insurance Co.	653	John Domme	650.00
" "	681	Pamille Van Leags	800.00
American Insurance Co.	7,570	Andrew Meder	500.00
North British & M. Ins. Co.	3,454,647	John Sell	800.00
Shawnee Fire Ins. Co.	123,455	Fred Fensky (John Bwosamer)	1,150.00
" " "	104,386	(Ben Dustin)	600.00
Continental Ins. Co.	4,329	J. B. Gibbons	800.00
Shawnee Fire Ins. Co.	123,476	Fred Fensky (George Lippart)	900.00

You will find that the premiums on the first eighteen of them has been paid by the purchaser, these are all marked on the top and show by whom paid. The other four were paid by Mr. Fensky and should be charged to the owners.

I also received a letter which you received from Mrs. Carrie Neef, which I return to you enclosed. Mrs. Fensky says that she is willing at any time to give them a deed, or to quit-claim to them all the interest she has in the property.

Very truly yours,

(Signed) John V. B. Goodrich.

Exhibit 22

Nov. 12th, 1903.

Mrs. Jeanette Fensky,

Dear Madam: --

I have just this moment received yours of 9th. inst. enclosing letter from Mattern to you. He has been after me several times to clean the cistern, but I told him that he would have to fight it out with Mr. Sims as I intended to look to Sims for all the rent. Sims seems to think that Mattern's demand is unreasonable and gave him to understand that if he did not want to pay the five dollars for the property he could quit. I jokingly told Mattern the other day that I thought I would dig him a new two-hundred-barrel cistern and then reduce his rent to \$2.50 a month. I simply wanted him to understand that he could not expect any very extensive repairs on five dollars a month. I will keep in mind what you say however, and be governed largely by circumstances in the matter. It seems there is no

end to repairs caused by the flood. The pump back of the stores Nos. 842 and 842½ Kansas Avenue is ruined and I had to order a new one put in today by Mr. Foucht. I may conclude to say to Mattern that if he wants to clean the cistern out for five dollars we will allow him that much.

I don't exactly understand what you mean by taking deed on the Sachse property. If no tax deed has ever been taken I am afraid it is too late now to do so; but look up the tax sale certificate and send it to me as I must have that in any event to get the deed.

Don't you think we had better sell the laundry property to Sims if he will take it at anything like what it is worth, and give him easy terms to pay for it? Give me also the prices on the other properties. I know you had better sell if ever so cheap rather than be having the continual expense for repairs.

None of Fred's brothers or sisters have said a word to me yet about the estate, and I am a little surprised that Mrs. Pickens does not say anything to me about it. Are you making any effort to buy them out? If so, keep me posted so that we may not in any way interfere with each other in any efforts in that direction. The only thing that I am at all afraid of there being any trouble over is the Addition contracts. I am a little afraid that the heirs may claim them as personal property, although I have not had a hint of anything of the kind as yet from any source, and I don't believe that the court would so hold if the question was raised, but I would feel safer if the Addition people would take the deeds that you and Fred made and which,

of course, when recorded, would appear as if the title passed all right while Fred was still living, but they don't seem to care about doing so and of course I cannot urge it. I gave Lippert his and took back a mortgage payable to you and there are a number of others where it would be perfectly safe to do so from your standpoint, but they don't seem to see the importance of it from their standpoint. However, I will do the best I can and hope there will never be any claim made by the heirs for that part of the property.

Respectfully,

M.T. Campbell.

Exhibit 23

Box 1804 -- San Pedro, Calif. Nov. 20, 1903

M. T. Campbell, Atty,

Dear Sir:--

Your letter of a few days ago received & will proceed to answer. Regarding Mattern will say, I thought it would be to my advantage to have cistern fixed. Regarding Sims -- if you can make a deal with him for \$2500 (twenty five hundred dollars) for lot and buildings, or \$2800 (twenty eight hundred dollars) for vacant lot & buildings and can arrange the payments satisfactorily, you may do so. \* \* \*

The Quincy St. property I want thirteen hundred dollars (\$1300) for, and at least one fourth paid down. Paramore property, will sell it to either one or two parties -- each party paying fifteen hundred dollars (\$1500) and one third cash, or will sell to one party for three thousand dollars (\$3000), one third cash. Now regarding the addition contracts & deeds. Give



me your idea as to whether it would be best for me (or my attorney) to write direct to those persons holding contracts and ask them to take deeds. If you think it is best for me to write and ask them to do so, please send me the names of those parties whom you think has paid enough to make us safe in giving deed.

Please pay half the tax on all of the properties. I have not made any effort direct to the heirs to buy any of them off, and I think it is best for you to see what you can do about it first.

The Court here has set aside this property where I am living as a homestead.

Now about the Sachse property. I haven't had an answer from them yet. I think you will find tax sale certificates in Court House, as Fred left them there. The person who was Sheriff there when we left, is the one whom you may see regarding tax deed.

As Fred had written two letters to Mrs. Neef & wanted to make that tax deed direct to her -- Did not get an answer from her and we came away & the deed was never taken out. So you better take it out in my name. Within you will find one tax receipt for the Sachse property, as you will take notice by reading it, the receipt was given in 1901 for her property alone but the other receipts were not alone, but only one receipt was given and several properties included on the same -- therefore the Sachse prop. was included with our properties.

Very Respectfully,

Mrs. F. Fensky,

per M.S.F.

## Exhibit 24

At Home Monday Eve 23 Nov 1903

Mrs. Fensky

I wrote you a card just before I left my office this evening and a minute after I put it in the box on my way home I met Mrs. Pickens, the first time I have seen her for two or three months.

She said she had just been down to the Quincy street house as Mr. Krauss told her about it, but she said it was so damp and musty, and so badly out of repair generally that she could not live there and wanted to know if you did not have some other property on the south side that you could let her have instead of the Q st. lot. She did not want anything on the north side. I told her you had nothing else on the S. side and then explained to her that it would be a good while before all the notes and mortgages could be collected and that may be some of them never could be all collected, that in any event it would be a good while before any one could compel distribution without giving a good bond etc. and that if she could get hers now in property, it would perhaps be better for her than to wait. She wanted to know about how much there would be to distribute. I told her I had not figured the matter closely but that if all the notes and mortgages were collected I thot' there about \$20,000, and that  $\frac{1}{2}$  of it would go to you and the other  $\frac{1}{2}$  to the other heirs -- in short that each of the heirs would get about \$1000. Yesterday I told Krauss about the same thing. If we could only agree on the amount each ought to have then the wise thing to do would

be to buy them out and then you could use your own pleasure about making the debtors pay up promptly. Many of them have got so used to Fred's leniency about giving them time to pay up that it will go hard with some of them if they have to raise the money soon. Jos. Bausch was in today to see if he could not let his run. I told him as far as you were concerned it would perhaps be all right but others had a say so now and that they would probably be clamoring for a division. If he writes you I think you had better consult Mr. Goodrich before you answer. I had about the same kind of talk today with Wardell. His note is due next May.

I am afraid if you write to the Add-people about the deeds that it will arouse suspicion that something is wrong. And should any of them go to a lawyer and ask him about those deeds he would tell them that a deed signed but not delivered nor to be delivered until after the death of the grantor was no deed at all, and that would scare half of them out of their wits. And yet I know that if they take these deeds no question will ever be raised as there will be nothing of record to show when they were delivered and they would show that they were signed (altho not made because the delivery is a part of the making of a deed) before F's death. I would rather they would take these deeds now than a deed from you alone, simply because that property is not as likely to attract the attention of the "heirs" if it looks like it was sold before F died instead of after he died. I don't know

that any of them will ever claim that the Addn-contracts are a part of the personal estate and subject to the California law, but it is too early yet to tell what they will claim. And if they do make such a claim, I think we can defeat them, but I want, if possible, to save the trouble and expense even of defeating them. I reason therefore that all the lots that will show on record as sold before F's death are just that much further away from the probability of attack; because no one would be foolish enough to claim that the heirs had any right to a note and mortgage made to you on property that was sold by Fred himself. With this idea in view and for the sole purpose of more thoroughly protecting you against possible claims of the "heirs" I have picked out about a dozen of the Add-people from whom I think it would be safe for you to take a mortgage, and I have suggested to most of them that if they wanted their deed now I would advise you to give it and take a mortgage for the balance, and I will tell them I feel sure they will pay out all right and never put Mrs. Fensky to the expense of foreclosing the mortgage. I was rather surprised that they did not all embrace the opportunity at once but since Lippert and Havens have taken their deed I feel quite confident that a number of others will want them. I will have to give them the privilege of paying on the principle at any time they may choose before maturity but that will make no difference to you unless you should want to sell the notes. Such notes, of course would not be as saleable to people who would want to invest solely for the sake of the interest.



I feel sure that Mr. Goodrich will agree with my view of this matter as the best way to keep the Add contracts out of any possible controversy, but it will require some tact to get the folks to take the deeds and give back the mortgages notwithstanding it is to their interest to do so and I am afraid a letter from you or Mr. Goodrich to them in regard to the deeds will arouse a discussion that might *embarass* us. So let me casually call their attention to their own interest in the matter when they come to make their payments and in that way it will not appear as if we were too anxious and as if I were doing them a favor and perfectly willing to do so as long as your interests are not prejudiced by the change.

I am rather disappointed that Mrs. Pickens does not take kindly to the Quincy street house but I am glad you have put a price on it. It is the only property that is at all likely to sell any ways soon. I'm afraid the scheme to buy out the heirs will not work. They are so scattered and I think have an exaggerated idea of Fred's wealth and will therefore have their ideas about their "shares" away up. But suppose the opportunity offers for me to talk about it to those here, how much shall I offer?

There has been a whole lot of red tape and tomfoolery incident to a new Carter loan with which to pay off the mortgage the estate holds but I think the last touches have been put on and that I will soon be called upon to enter satisfaction of your mortgage.

Is there any property out there that you have to divide with the "heirs?" I only care to know so that

I can speak advisedly in case any of them talk to me about the amount they ought to have. My excuse for my pencil is that I can write so much faster with it. Hope you can decipher my lines without much trouble.

Yours,

Matt Campbell.

Exhibit 25

San Pedro, Cal.

November 28th-1903.

My Dear Sir:-

Mrs. Fensky called on me, and is quite anxious to obtain from the heirs-at-law quit-claims or receipts in full for their interest in her late husband's estate. Of course, she does not feel like giving any fancy sum to any of them for their interest, and in order that you may talk with the heirs who are located at Topeka, I send you herewith a statement of the inventory which has been filed here, which includes all of the property that belonged to the estate at the time of Mr. Fensky's death, except the homestead where Mrs. Fensky lives, to wit, her house and lot which property the Court has already set apart to her as a homestead, and which becomes hers under said order, absolutely.

A lot in the suburbs of the City of Los Angeles, appraised at.....	\$ 600.00
11 lots on the outskirts of San Pedro appraised at .....	600.00
20 acres of land of poor quality in Orange County in this state, appraised at	600.00
60 acres of sand and sage ranch land in the same county, appraised at.....	1,400.00

One promissory note against F. C. Rich-	
ter, appraised at.....	400.00
Household goods appraised at the sum of	100.00
(but these household goods have also	
been set apart to the widow by the	
Court.)	

Total	<hr/> 3,700.00
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She is also allowed \$50.00 per month out of the personal property during the administration of the estate.

Now as you will see from the above, the whole amount of the estate here, which is subject to distribution, as appraised, is \$3,700.00, and of course, she is entitled to the \$400.00 and the \$100.00 personal property, which leaves \$3,200.00 in real estate. Now, if we are compelled to sell this real estate under a license from the Court for the purpose of distribution, I think it would bring much less than what it is appraised at. Out of this real estate, under our law, the widow is entitled to one-half, after the expenses have been paid; and the heirs, there being eight of them, would be entitled to an undivided one-eighth each of the remainder, which, you see, would leave them but a small amount each out of the property that is here.

Now you know what the property is there, and, of course, the heirs cannot expect any of that property there which could, in the least way, be recognized as real estate. And if any of the personal property belonging to his estate, which is in your hands, is to be distributed under the laws of the State of California, then out of such personal property would come all of

your expenses and expenses of the distribution of the estate, and then when the widow has one-half of the balance of said personal property, if any, it seems to me that but little would remain to distribute among the heirs. So you may talk with them on that line, and see what can be done with each of them, so that a large expense may be saved if we are compelled to sell the real estate here, under an order of the Court.

Mrs. Fensky is well, and we are getting along with the estate nicely here, and, after the expiration of the four months, will be prepared to close up matters here, provided we can come to an understanding with the heirs, etc.

Very truly yours,  
John V. B. Goodrich.

Mr. M. T. Campbell,  
Attorney-at-law,  
Topeka, Kansas.

Exhibit 27

Topeka, Kansas.  
19th Dec. 1903.

Mrs. Fensky:

I had a long talk with George at my home last night and among other matters discussed, I talked about his taking property for his interest in the estate. I suggested the laundry property—the 54 feet the laundry is on— and he said he would be willing to take that subject to a mortgage of \$500 to you for his interest in the estate and asked me to submit the proposition to you. Should you agree to this I will prepare a deed from you to George Fensky and send to you to execute



and will then take back a mortgage from George to you for \$500 on the same property payable say in 5 years with interest at six per cent payable semi-annually and will have him assign to you all his interest in the F. Fensky estate.

Let me know what you think of this when convenient.

Since I commenced writing this letter the Topeka Railway Co. accepted my offer of settlement and have paid me \$25 and agreed to put back the sidewalk and I signed receipt in full. Am satisfied this is a good compromise of that matter. Think I learned this morning who Mrs. Geo. Raymond is and will pay her and Mrs. Roberts the Christmas presents today so that they may have the benefit of it as soon as possible.

M. T. Campbell.

Topeka Kansas, 8th Jan 1904

Mrs. Fensky/

(K. P.)

I just now paid ~~C. K.~~ Herman \$2 for repairing the roof at 842 and 842 1/2 Ks Ave and I am very favorably impressed with the man. He seems to be an honest workman and if he does his work well is certainly reasonable in his charges. Laura told me about him first and I am going to have him do some work for me instead of the painter I have employed so long.

Herman says the store roof very much needs a new coat of tar and sand and the fire walls need to be re-cemented. He offers to do the job in good shape as soon as the weather permits for 85cts a square and he furnish everything. He offers to repaint the Sachse-

roof for 50cts a square. (100 square feet is a square.) I told him I would write you and let him know what you said about it.

I had a settlement with Simms yesterday. The bills which he has paid for repairs am't to \$416.90/ and his rent for six months and the \$100 sent him by Fred am't to \$310 which left a balance in his favor of \$106.90. For this I gave him credit on his note (which I understand & am treating as your individual property and not the estate's) for \$29.40 in full of one year's interest up to 20<sup>th</sup> Dec, 1903, and \$77.50 on the principal. So that his rent at the rate of \$35.00 per mo for rooms and laundry commences from the 1st of this month. The repair bills were all honest & square and no charge for what he did himself. I have not asked Laura for a settlement, but have impressed on her that she must keep an accurate acc't of all expenses so as to report to you whenever you call for it. She suggested once that she ought to have some money on repairs and I will tell her that I could ~~have~~ <sup>have</sup> an order from you to that effect at any time. I paid \$7.50 recently for another year's ins, on the Sachse house.

Yrs,  
Campbell

Exhibit 31

Topeka, Kansas.

11th Jan. 1904.

Mrs. Fensky:

Just now got yours of the 7th inst. and have time for only a few words before going over to court. I do not need to ask the Judge whether distribution will be

made here or not. I will be, so far as the property I am controlling is concerned, when the time comes.

The California law will control the distribution of all the personal property that belonged to Fred at time of his death. I wanted Mr. Goodrich to have it administered on there, but he thought best to have the administrator here take charge of such notes as were given here, and they are all included in my inventory and when the proper time comes the heirs will put in their appearance and claim their share. They know that our law allows 3 years for creditors of deceased to file their claims against the estate. And while in this case there will be no need of waiting 3 years simply because we all know that Fred left no debts, yet there is no use discussing a settlement or distribution short of one year, and I dont want the question agitated until some of your individual matters are in better shape— principally the add. matter. The Court does not even know yet, officially, that there are any other heirs or that distribution is to be made. He can only act and render opinions when matters are properly before him as a court. The heirs will be heard from in due time.

As yet however none of them except Geo. are saying a word to me.

M. T. Campbell

Exhibit 35

30th March, 1903.

Mrs. Fensky,

A few days ago Mr. G. A. Baxter requested me to figure up the amount still due on his contract and let

him know, as he intended to borrow the money and pay it off and get his deed. I did as he requested and wrote him that the amount due by the 15th day of April, 1904 including interest would be \$1126.49. He called again today and said that while he could borrow \$1200 on the property he found he would have to pay — per cent interest on it, and he thought that was too much, and wanted to know that if he would reduce the amount to \$1000 whether you would not be willing to take the mortgage for that amount at 6 percent interest and give him his deed. He says his property is well worth \$2500, but whether he exaggerated in this matter or not I believe if I was in your place I would give him his deed and take the mortgage for \$1000. I am so anxious to have all of them that have paid enough to get their deeds before the probate court takes any action to distribute the estate that I think it best to take a little risk in the matter of security for balance due on the lot. ./ So if you take this view of the matter, please let me know promptly on receipt of this letter and if he pays me the \$126.49 in cash I will furnish abstract and deliver his deed and take from him notes for \$1000 payable at the rate of \$200 a year at 6 per cent per annum payable semi-annually with mortgage on the four lots to secure the same.

One of the stores in the Paramore building is vacant and I have asked the real estate man to help me find another tenant.

I had to have the Laundry roof repainted with asphalt roofing recently at an expense of \$22.50. It



got so bad that it had to be done I got John Bradley to do it and he guarantees it for two years.

What about the Sachse property? Hadn't you better deed that over before we have to paint that roof.

Mr. Stein hasn't commenced on the new store front yet, but I suppose he is keeping you posted in regard to it.

Respy, M. T. Campbell

Exhibit 36

Topeka, Kansas, April 2d, 1904.

Mrs. Fensky,

George Kimmerle has just been up to see me about having the old flood mud taken off the lots back of his and your stores so that the water will run off towards the alley instead of back into the buildings. There has been no special complaint by the authorities heretofore, but in view of the coming warm weather the health officers are requiring the flood sufferers to put their premises in a sanitary condition and it simply has to be done. The flood left from one to three feet of mud over the ground and this requires a good deal of grading to get the lots back in condition to run the water away from the building. George promised to look after the matter and have it done for both of us just as cheaply as he possibly could, and I told him to have it done. By the way, does George still owe you anything on old indebtedness? I told Laura once to settle with him on the theory that whatever he owed was due to you individually (and that I would pay no attention to it as administrator,) and I have never asked her whether she did so or not; but if he does owe

you anything would like to turn it on this grading expense.

I have not found a tenant yet for the store. George says one of his is vacant also, but he is thinking of putting in an oven and renting it to a baker. There are six or seven store now vacant on that side of the avenue between Norris and Laurent streets, But I think yours is more apt to rent simply because it is smaller and therefore cheaper than most of the others. I wish Stein would hurry up with his new front.

Respectfully,

M. T. Campbell

Exhibit 38

San Pedro, Calif., Box 1804,

April 6th, 1904.

M. T. Campbell Esq: -

Topeka, Kansas.

Dear Sir: -

Your two letters rec'd & will endeavor to ans. immediately. Yes you can take that mortgage from Meder and I wish you would let me know how much money of my own you have on hand as I think of buying some property in Pasadena & I will need it. Now, about Mr. Kimmerle, it is all right for him to grade the yard. Please ask him if he will do it on the old account, if not we will have to pay him, but please see that he don't run a big bill upon us. He has never settled with me yet, nor given me any account of what he owes me, but his daughter wrote me that he will pay me as soon as he can. As I have no writing whatever I shall have to trust to his honesty.

Mr. Campbell please collect the rent from Mrs. Laura Coughlin promptly every month as I don't want it to drag on this way any more. Please give me the names of those people in the addition to whom you have given deeds, also contracts.

Yours very Respectfully,

Mrs. F. Fensky

Exhibit 39

Topeka, Kansas.

11th April 1904.

Mrs. Fensky: -

Just rec'd yrs of 6th inst. here at my office and will answer part of it now & tell you about the money when I get home tonight where I keep my account. I will speak to Kimmerle about the old account & if he still owes you think he ought to be willing to let the expense of grading apply on it. I spoke to Foucht this morning about tin roof. He said the best tin roof would cost \$8 a square, a medium quality of tin \$7 & a poorer grade \$6 per square, and that he would be willing to do the work & let it apply on his note. If the note was your individual property that would be a mighty good turn, but as it belongs to the estate it is not much advantage to you.

I thought Laura was accounting to you for her rent. Guess she will be surprised to have me ask for the rent but I will obey directions.

I gave deeds to and have notes and mortgages from George Brosamer, M. G. Tracy, Camille VanLaeys, E. H. Stamm, Benj. Dustin, Geo. Lippert, W. L.

Havens, Jos Walker, Reed Saylor, and will soon give deed & take mtg. from John Brosamer.

Those still holding contracts are: – Louis Schaeffler, Frank Sawyer, Frank Gutch, John Sell, Jacob Fink, Geo. Jammer Mollie Grant, Henry Frank, Casper Getty (assignee of Mike Etzel) Wesley Sager (assignee of Maurice Sawyer) John Dietz, J. B. Gibbon, George Hammrick, John Domme, G. H. Baxter.

Yrs,

M. T. Campbell

Exhibit 40

Topeka, Kansas. 11th Apr. 1904

Mrs. Fensky,

When I wrote you this morning at the Office the balance in my hand was \$1595.61 of which I herewith send you check for \$1000.00

Yrs,

M. T. Campbell.

Exhibit 41

28th, April, 1904

Mrs. Fensky

On the 22d. of January last Maurice Sawyer sold and assigned all his interest in his contract to Wesley Sager who has kept his payments up every month since and I think is a very good man, and safe to take a mortgage from for balance due on contract which is a ~~very~~ little over \$700. As the old deed was made to Maurice Sawyer I herewith return it to you with one for you to make to Sager in its place. So sign, acknowledge, and return it as soon as convenient, and some time next month I will deliver it to Mr.



Sager and take back notes and mortgage payable to you. More of them are getting in the notion of taking deeds and then I get that phase of the business closed up I will begin to think about taking steps to close up the estate, and although there are quite a number owing the estate who can't pay for some time yet. Still it may be possible that we can agree upon a division of the notes and mortgages among the heirs the same as the money. I told Oscar Krauss once to furnish all the names of Fred's brothers and sisters but he has never done it yet. If you can give me their names and addresses I wish you would do it, as when I make my report to the court I want to mention who they are.

Mr. Stein has about completed the new fronts and they look very nice. I have agreed with a new tenant for the empty store for six months at \$100 to commence the 1st of May but the other tenant I understand is *goin* to move out unless I reduce the rent to \$15 a month. I shall tell him of course that he does not wish to pay \$16.65 a month he may go, and I will take the chances of finding another tenant; for if the rent of the room is reduced to \$15 the other will have to come down to the same, as I told the new tenant last evening I would treat him as fairly as the other one. There are lots of empty store buildings in North Topeka, and the high water is already scaring lots of people out, and I see them moving away. But there is nothing to do but to stick to it and take our chances on another flood. I rather think Mr. Stein will advise leaving the old roof along for another year or two.

His bill I think for the whole business will be about \$250, and I told him today that whenever he presented his itemized account I would promptly pay it. I know he is doing a good job and I don't suppose he is charging a cent more than it is worth.

I took a mortgage from Meder on the Clements lots for \$425 and sent Clements all his money (\$ ) as Meder had paid \$50 before he made the mortgage. He intended to                      and make your mortgage for only \$400 as I wrote you. But he wanted another month to pay the \$25 and so I just included it in the mortgage.

Respectfully

M. T. Campbell

Exhibit 44

Topeka, Kansas.

26th May 1904

Mrs. Fensky,

I sent for Geo. Fensky and had another talk with him today about his interest in the estate and explained to him that the share of each heir would probably be about \$1000, and advised him to buy the Laundry property of you if he could get it and thus get his share soon.

He seems to be afraid that he will create the impression on you that he is urging the matter and he hesitates to make a proposition. I will say for George that he has acted very gentlemanly about his interest in the estate and always speaks respectfully of "Aunt Jennie" and shows no disposition whatever to hurry matters.

He simply says and very modestly, "of course if there is anything coming out of the estate to me, I will be glad to get whatever it is. And if Aunt Jennie is willing to let me have the laundry at a reasonable price I wish she would make me a proposition, how much difference she thinks she ought to have, and how much time she would give me to pay it"

Now suppose you write me just how much you must have from him besides his interest in the Fensky estate, if you give him a deed to the laundry. And if he agrees to your proposition I will prepare the papers at once and close the deal. Of course he would have to have time on the difference and would give you a mortgage on the property to secure it. I want to see you get out from under the burden of expense that that old property will be for years to come.

Do you have any communication with any of the heirs? I told Krauss once that I thought each heir would get about \$1000 and that if he would get a power of Attorney from the sister in Germany I would not delay closing up the estate any longer than necessary as I felt sure no claims would be filed against it and I did not care to keep it open simply because the law allowed it. But he talked like it would be too soon to do anything before at least a year had elapsed and I don't suppose has given the matter much thought since. If you think it worth while to try to buy out the heirs, it ought to be done before I take any steps toward a distribution through the court. I would like also to get some more of the Addition people to take their deeds before any developments in court. I don't

fear any contest unless some of the heirs get the fool notion in their heads that the lot and land contracts are personal property and subject to division. Whether you try to buy out any of the others or not, I hope you can trade the laundry property to George and get him out of the way – or rather get that property out of the way. It will be a long time before there will be a demand for it. I believe Simms is doing a good business there, but if he leaves it I'm afraid no one else will rent the old building. And I want you to sell while you can truthfully say it brings a fair rental.

M. T. Campbell

Exhibit 47

22" June 1904

Mrs. Fensky: –

Excuse pencil – – I can write so much faster with it. Just this moment rec'd your of the 18th instant and have only a few minutes now to write (but will very soon send you statement of account between you individually and myself) and make you a remittance as you request in your of 14th instant rec'd yesterday. I see you "catch on" to the point in giving deeds to parties holding contracts, but strange to say there are about half dozen who are so afraid of the word mortgage that they will not take their deed and I can't talk too much about it for fear of arousing suspicion and perhaps inquiry of some "fool lawyer." I have gotten so out of patience with Schaeffler and Gutch about it that I can hardly conceal it. They are all right and so are others that I have offered deeds to, but they prefer



to pay on the contracts and it will not do to "crowd" them.

I will tell Simms what you say about the papering, but I guess I made a mistake in the room. It was a room anyhow where the flood got away with the paper. Volker is still trying to make a raise of the cash payment and wants the property badly, but I am afraid his folks will not help him. Mrs. Gibbons still drags, but gets around "in the course of time." She paid \$10 yesterday and promised \$15 next month. Mrs. Deitz just now called to tell me she would take deed and give note and mortgage for balance due. I asked her all about Domme and she thinks it will be safe to let him have \$100 more. I don't feel entirely satisfied with it, but as you leave it to my judgment I think I will risk it and give him his deed as the least of two possible evils. I am satisfied with his honesty -- it is only a question of his ability to pay. As to the Sachse property, the city condemned the side walk where the wagons used to cross and got a lot of brick there to rebuild it, but I went to the street commissioner & got him to let me fix it.

So I got a colored man, Mr. Small, to gather up some of the flat stones that was formerly there and then take his wheelbarrow & skirmish around for a stray brick & with two loads of sand he fixed it up at a cost of \$4.75. I hope Neef will have sense enough to take it off your hands, for the roof needs painting and some other repairs are needed. The present tenant has fixed it up to look right nice at his own expense.

I wonder if you did not leave out something in your last letter. You have a sheet numbered "2" which commences, "Now in regard to Mrs. Richter" and it ends "Please give me your opinion on the matter" But I don't know who Mrs. Richter is or anything about the matter referred to which I suppose is explained in the part you failed to enclose.

Pruesner has not paid anything for a good while, and I'm afraid the margin is hardly safe enough to take a mortgage on. He is an honest man tho' and I am confident will pay out in the course of time if he can possibly do so. The flood gave him a hard rub, but he seems to be doing fairly well recently, And if you are willing to risk his ability to pay out it might be well enough to give him his deed and take back mortgage. (No Mrs. Rost is not paying rent. She has a contract for deed just like the rest & is keeping up her payments fairly well, but she owes about \$4500.00 and that is probably more than you care to take a mortgage for.) The building now extends to the alley and I suppose the lot is worth \$5500 to \$6000. And surely it will not decrease in value. Goff has not paid me anything and I have not seen him for a long time. Guess you will have to be easy with him, till he recovers a little more from the effect of the flood.

As soon as I got your letter yesterday I sent word to Geo. to come see me and he came to my house last night. He would like to have the laundry property, but is a little wary about undertaking the payment of the \$800, especially as you said nothing about the inter-

est and I told him I supposed it would be 6 percent. He concluded finally that he should write you himself and see if you would not do a little better, as he will have to be at quite a little expense to put the property in shape for winter use.

The insurance expires in a few days and a new policy for \$1000 for one year will cost \$31.20 -- less 10 per cent which the agent said he would allow me = \$29.08. I will see that it is renewed in time. I hope tho' that you and George will make a "dicker" so that you will get the property off your hands. If you should sell to him I propose to take an assignment from him something like the enclosed draft. Show it to Judge Goodrich and see if he thinks it all right. In order to save time I believe I will enclose a deed with this for you to sign and if you do not trade I can destroy it. I am not sure about the number of feet you own of lot 64. If you know Just insert it. You own in all either 54, 56 or 58 feet and I am confident 50 feet of it is South 50 of lot 66.

I allowed Laura \$1.50 for repairs and work on Simms part this month & will have to pay Stien a small bill for work in repairing doors &c at Simms. I suppose you got the Kimmerle due bill all right.

If there is any item in the copy of acct I will send you that you do not understand, call my attention to it and I will explain it.

I rather expected you to send me the names & residences of all the heirs so that I would not have to ask Krauss for them. I want to name them all in my first report to the Court. I asked Laura if she thought it

worth while for me to see her father in regard to buying his interest in the estate on a basis of about \$1000 & she said she was afraid not, as he had an idea that there was much more coming to him than that. I think Laura looks at the matter in the right light, but I guess she has no influence with her father. Well I have strung this letter out so long guess I won't send the Geo. Fensky deed.

Yrs,  
M. T. Campbell

Exhibit 48

22" June 1904

Mrs. Fensky,

I wrote you this morning and thought possibly by noon my boys would have our acc't copied off so that I could have it sent to you when I went home to dinner, but it is not finished and I may not send it till day after tomorrow. I am satisfied tho' that the balance in your favor is something over \$1500, and so will send herewith my check for that amount. I think that will leave me about enough to pay Domme and the insurance on Laundry.

I stopped just now on my way over to my office to tell Simms that you would allow \$5 on the papering of the sitting room (instead of dining room) and Mrs. Simms said Mr. Booker was already doing the work and she did not know what his charge would be. This man Booker is your tenant in one of your store rooms and I have to prod him a good deal to get the rent. I told him the other day that if you would do the



papering for Simms and if he would do the job as cheap as any one else, I would get him to do it. And it seems that he has gone to them and told them I told him to do it. I did no such thing, but simply told him to look at the job and let me know what he would do it for and then if you allowed it and if he would do it as cheaply as any one else I would let him do the work and credit him on his rent. If his bill much exceeds the \$5, I am liable to have a racket with him.

Herewith find deed for you to execute to Geo. in case you and he agree on price. How would it do to let him pay the \$800 as follows \$100 in one year, \$200 in two years, \$200 in three years, \$300 in three years, without interest if paid when due, then 6% after due. In other words make it a strong inducement for him to pay when due

Respy,

M. T. Campbell

Exhibit 50

Topeka, Kan. 5h July 1904

Mrs. Fensky, — Rec'd your letter of 29th June with enclosures about an hour ago & have sent word to Geo. to come to see me. He will come to my house this evening & I think we will close the deal for the laundry. The insurance expired & I had to renew it. I paid for new policy \$28.08 but I have collected this month's rent, so if Geo. takes the property he will take the rent from 1st Aug. I return the deed for you to sign & hope you will get it back here as soon as possible. I find you own 4 feet of lot 64 & 50 feet of lot 66.

I wrote Goff last week & he just now came in & paid me \$22.50. He says that Fred gave him last year's interest, and he intends this payment to be for the interest that would be due 1st July, 1904. I told him I did not feel at liberty to receipt him for the \$90.00 that would have been payable last year – that is \$22.50 due 1st July, \$22.50 due 1st Aug. \$22.50 due 1st Sep. & \$22.50 due 1st Oct. 1903 – but for him to write you & if you directed me to do so I would make his contract show that he was released from last year's interest on account of flood. It seems to *to* have hit him hard. Perhaps it would be well for you to make a new contract with him – and also with Pruessner since they have paid so little on their contracts & you are now sole owner of the legal title. Talk to Judge Goodrich about this & see if he does not think it would answer about the same purpose, from the standpoint of the "heirs", as the giving of a deed & taking mtg. Jos. Bopp has sold his interest to Pruessner – not enough in it for both.

Enclosed find quit claim deed prepared for you to execute to Rudolph Neef for the Sachse property as also the tax deed for some property made to Fred. I will collect this month's rent of Warren today.

I am glad you sent me the names of the heirs. Never received them before. If you sent them the letter was lost. Never Rec'd the letter about Mrs. Ritcher either. Somebody would have to be appointed her guardian & I should think her son the most proper person. Will write him. And after I settle with George think I will at least make an effort to buy out

the others. If we can't buy them out, will take steps to have the court make distribution, as by that time I will have deeds in the hands of most of the Addition people & I think these some notes & mortgages that you would just as soon take as money on your share.

In regard to Mrs. Rost, if we were "dead sure" that no question would ever be raised by the "heirs" about these land contracts, I would say let the contract continue, but in view of the possibility of such a question being raised, and the fact that the property is worth \$1500 to \$2000 more than they owe you I believe I would risk taking a mortgage for am't due & giving her a deed. Expect to pay Domme the \$100 today & take back notes & Mtg for \$805.

Am glad Judge Goodrich prepared the quit claim deed for George to sign. When I prepared my assignment I was thinking only of the personal property – which is the only kind of property belonging to the estate in Kansas, but in view of his interest in the real estate in California, the quit claim deed is better.

Pruessner has only paid \$275 on his contract. The purchase price is \$2200.00.

Mr. Booher's bill for papering the Simms rooms was \$5.90 & I allowed him same on his rent for this month. He had to do quite a little patching of the plastering & charged a dollar for that, which was a good deal cheaper than I could have got a plasterer to do it. I had to pay a plasterer last week \$5.25 for about 4 hours work in patching about 8 yards of my home ceiling & walls.

I believe now I have answered all the inquiries of your letter and hope to hear from you soon again with the George Fensky deed & your opinion about the Goff-Rost-Pruessner contracts.

Respy.

M. T. Campbell

Exhibit 51

5th July, 1904

Mr. Frederick Fensky,

Leavenworth, Kansas

Dear Sir; -

Under the law of California where Ferd Fensky died intestate, One half of his real and personal property in that state goes to his widow and the other half to his brothers and sisters. The same rule applies to his personal property in this state and I have been appointed administrator of his estate here and have three years from the date of my appointment to close up the estate. The personal property here consists of notes and mortgages and on their face amount in the aggregate, including money collected, to about \$21000. Quite a number of the debtors want more time in which to pay & If Mrs. Fensky, the widow, was the sole owner of the notes, she could accommodate these people and still collect nearly all of the money in the course of time. I can't be at all sure how much each heir, besides Mrs. Fensky, will be likely to realize out of the whole estate after all expenses and losses are paid but I think somewhere in the neighborhood of \$1000.. I have advised Mrs. Fensky that if she can



buy out each of the other heirs for \$1000 or less, to do so, and then make whatever terms she desires with those debtors who want more time on their notes. If you think favorably of the suggestion and are willing to accept \$1000 in full of your share, please let me know soon and I will prepare an assignment of your interest and send you without delay. I am making the same proposition to the others and think it will be accepted as the best thing for all parties concerned under the circumstances.

Respy,

M. T. Campbell.

6th July 1904

Exhibit 52

Mrs. Johanna Schutt,  
719 N 16th St.

Omaha, Neb.

Dear Madam;)

Under the law of California, where Ferd Fensky died intestate, one half of his real and personal property in that state goes to his widow; – the other half to his brothers and sisters. The same rule applies to his personal property in this state, and I have been appointed administrator of his estate and have three years from the date of appointment in which to close up the estate. The personal property here consists of notes and mortgages & on their face amount in the aggregate, including moneys, collected to about \$21000. A number of the debtors want time in which to pay & if Mrs. Fensky, the widow was to take over these notes

she could accommodate these people and still collect nearly all the money on the notes in exchange of them. If collection is forced, there will necessarily be much expense and loss attending collection. I can't be at all sure how much each of the heirs besides the widow will likely realize out of the whole estate after all expenses and losses are paid but I think somewhere in the neighborhood of \$1000 & I have advised Mrs. Fensky that if she can buy out the other heirs for \$1000 or less, to do so and then make whatever terms she desires with the debtors who want longer time on their notes. If you think favorably of the suggestion and will accept \$1000, in full of your share of the estate let me know soon and I will prepare an assignment of your interest to Mrs. Fensky and see that you get the money without unnecessary delay. I have such an agreement with one of the heirs here (George Fensky, a nephew) and expect to settle with the others on a like basis. I believe such a settlement would be fair to Mrs. Fensky and under all the other circumstances better for the other heirs, as it would save time and much court costs.

Respy,

M. T. Campbell

Exhibit 53

Topeka, Kansas, 6th July, 1904.

Charles Fensky

Pueblo, Colorado.

Dear Sir: -

Under the law of California where Ferdinand Fensky died intestate, one half of his real and personal

property in that state goes to his widow and the other half to his brothers and sisters. The same rule applies to his personal property in this state and I have been appointed administrator of his estate here and have three years from date of my appointment in which to close up the estate. The personal property here consists of notes and mortgages and on their *face* amount, amount in the aggregate (including moneys collected) to about \$21000.00. A number of the debtors want time in which to pay their notes and if Mrs. Fensky, the widow, was the sole owner of these notes she could accommodate these people and still collect the most of the money in the course of time. But if collection is forced there will necessarily be much expense and loss attending the collection. I can't be at all sure how much each of the 8 heirs, besides the widow, will realize out of the whole estate after all the expenses and losses are paid, but I think in the neighborhood of \$1000, and I have advised Mrs. Fensky that if she can buy out the other heirs for \$1000 or less to do so and then make whatever terms she desires with the debtors who want longer time on their notes. If you think favorably of the suggestion and will accept \$1000 in full of your share of the estate let me know soon and I will prepare an assignment for you to make to Mrs. Fensky of all your interest in the estate and see that you get the money without unnecessary delay.

Respy,

M. T. Campbell

## Exhibit 55

Mrs. Fensky:—

Rec'd the George deed yesterday and will close the deal with him soon. When I wrote Richter, I also wrote in substance the same offer to the others, altho the letter to Germany has not been sent yet.

This morning I stopped to see Krauss and he said Charles had referred the matter to him and that he would come to my office next Sat. & talk the matter over with the view of writing to Chas. & telling him the facts as he may learn from me. I intend to show him my inventory & Judge Goodrich's statement of the California property & I feel pretty sure from the way Krauss talks that he will advise the sale to you of each share for \$1000. If they are willing to accept that I want to be sure that it is satisfactory to you before I pay out any money. I will use the form of release, and quit claim Judge Goodrich prepared in George's case and soon close the deal after it is agreed to. So be sure to write me soon that it is all right to pay the \$1000 to those who see fit to accept.

Will put the Wehlke deed on record to day. Directed an Insurance agent to insure the house.

Hope you are getting a Topeka paper regularly so as to keep posted in local public matters here.

Yrs.

M. T. Campbell

14th July 1904

## Exhibit 56

Office 11 A. M. 16th July '04

Mrs. Fensky;—

I wrote you last night at home and on my over this morning stopped and told Simms that the sale to



George would probably fall thro', and thought if he vacated the building I should expect at least 30 days notice. He said he had bought a laundry on this side of the river (I knew he had) and that if the one he was in was not fixed to suit him very soon he would certainly leave it, as he was paying \$30 a month rent for the other one and was going to consolidate the two very soon. He is provoked that you will not allow the partition to come out, and besides want other changes made and he felt sure if George got the property that he and George could agree on the changes. I don't know whether he told George about Fred offering him the property for \$2250 or not, but he likes to "stick" it at me every once and a while. He wanted to know what George was to get it for, but I evaded the question and told him in substance that whatever you might be willing to do with Geo. was no criterion to go by for others. I am thoroughly satisfied that Simms does not want to buy it himself – he would not give \$1800 for it, but he thinks if Geo gets it that he may have such changes made as will make it desirable to put the other laundry with this rather than move this to that. I hope for your sake he will not leave, as I do not think any one else will want it

Oscar Krauss called this morning and I showed him copy of my inventory filed in court, and read him such portions of Judge Goodrich's letter in regard to your inventory there as I thought proper and he made a minute of the amounts – which aggregate something over \$24000 and is to give me his idea of my proposition to pay each \$1000 soon. I showed him what I had

written to the heirs and handed him my letter to Mrs. Wendt for him to send when he wrote her. I feel pretty confident that he will recommend a settlement on that basis. And from your stand point I am sure it will be much better for you if they will accept that much. You will not only make money by it as an investment, but it will avoid the possibility, of any contest in Probate Court. I am only afraid some of them will not accept the offer. If they accept the main inducement will be the early payment rather than wait two more years as I have indicated they might have to. Krauss talked like he thought Frederick would be the hardest one to settle with. But I wrote him also & guess I will hear something from him before long. Let me know what you and Judge Goodrich think of the proposition as soon as possible.

Yrs

M. T. Campbell

Exhibit 59

Topeka, Kansas. 25th July, 1904

Mrs. Fensky:

On the 5th. of July I wrote to Frederick Fensky as I did to the other brothers and sisters the proposition to give him \$1000 for his interest in the estate, and recently he wrote me that after careful consideration he had concluded not to accept the offer but to wait and get his "full share", as he expressed it. I intended to send you his letter and may possibly have done so as I cannot find it this morning, but I am writing now to say that he called on me yesterday and talked as if he

might, after further consideration and after writing to you, still accept the \$1000 and make the assignment. It's the first time I ever saw him and I soon discovered from his talk that he is a little erratic and must be handled with care. He is the first one that has asked me particularly about the addition-property and he catechised me particularly about the contracts, and the number of houses built, &c: and trenched very closely upon the idea that those contracts were personal property and subject to the same law governing the distribution of the rest of the personal property. He gave me no hint that he had got his ideas from any lawyer and I was rather surprised as well as disappointed to find his attention turned in that direction. Before we got through he drew out the fact that the most of the addition-people had deeds to their property, and then he wanted to know why the notes and mortgages taken from them were not personal property of the estate, and I explained to him that they were made to you and were your own individual property, and that those purchasers that had not taken deeds had possibly forfeited their contracts and that in any event that real estate belonged to you individually and the estate had nothing to do with it. But it's the very question that I have sought from the beginning to avoid any contest over if possible, and I hope yet that we will get a settlement with all of them without a fight in court. I was very careful not to arouse his animosity and he shook hands with me when we parted saying he would think the matter over further and very likely

would still accept the \$1000 and make the assignment if the rest of them did. I told him that Richter and Charles had already agreed to the proposition and that I felt pretty sure the others would, but for him to decide for himself just what he thought was right in the matter and to act accordingly. I told him that had Fred made a will as he fully intended to do that he would have left everything to you, in which case, of course, the brothers and *sisters* would have nothing to say about his estate. He seemed to be surprised at this statement and said he was going to write to you --- that you had always treated him nicely and that he would believe whatever you said, and that if you said that Fred did not intend to leave anything for his brothers and sisters but wanted you to have it all it would make him feel differently about the matter. Anyhow, he talked as if your say-so would have a good deal to do with his decision. Now if he really does wait to hear from you a good deal depends on your tact in answering his letter. You want to show in an incidental way without appearing to make it too prominent that Fred intended to leave everything to you but delayed making his will a little too long, and since it was left for the law to distribute you wanted all the heirs to share alike, and want him as well as all the rest of them to be thoroughly satisfied that it is the right thing to do to accept the \$1000 before making their decision, but that under all the circumstances you do not feel like risking any more than that before the estate is closed. I don't think I would write to him at



all if I were you about the matter unless he writes to you. I feel confident that Krauss's influence has been in favor of his acceptance of the proposition, and that encourages me to believe that Krauss has advised Mrs. Wendt to accept it. I have no word yet from the Omaha sister but I will keep you posted. I have seen Goff and will make new contract with him which I will send out to you to sign. I will manage the payment to all those who accept our proposition, so don't borrow any trouble on that score.

Respectfully,

M. T. Campbell.

Enclosed I send you the Wellke deed duly recorded.

Exhibit 63

13th Aug, 1904.

(Postal Card)

Just now got yours saying Nystrom could have store at \$15. I rented it the other day for a shooting gallery at the same old rate & got \$12 for bal. of this month. I hardly think he will keep it long, & then I will take the matter up again with Nystrom.

Am expecting George in any minute now to give me his decision about selling out his int. in the estate. Mr. Krauss started my letter to Germany on the 20th of July. Says he had to translate it all before he sent it. Expect an answer back with the assignment about 1st of Sept. K's confidence in me & his influence with the others is helping me greatly in getting settlement. Don't fail to let me know as soon as you hear from Frederick.

Yrs,

M. T. Campbell.

## Exhibit 64

Topeka, Kansas. 15th Aug. 1904

Mrs. Fensky: —

If Distribution has to be made through the Probate Court I am satisfied the Judge will allow, as compensation for the administrator, about ten per cent of the value of the estate distributed — between \$20000 and \$22000. In the case of such distribution you would lack from \$2000 to \$4000 of getting as much out of the estate as you will if you buy out the other heirs for \$8000.

In case, however, all of the other heirs sell out to you I can close up the estate with the minimum of costs, and therefore want to agree with you beforehand about my compensation, as administrator of the estate, so that I need not raise that question in court at all when I make my final report.

There are many advantages to you in buying out the heirs, if it can be done, rather than have distribution made through the court where many questions of dispute might arise, and much costs be made, and with certainly less money realized out of the estate by you.

So that I think for my compensation as administrator of the estate in the latter event it would be fair for you to cancel the Millice-\$1500 mortgage on my property.

I have already got assignments from four of the heirs and fully expect to settle the same way with all the rest, but may be disappointed in Frederick. I don't care for them to know how much money I have already collected on the notes, nor how much more I can collect

soon, if necessary. If they all sell out, then it is nobody's business but yours about the character of the estate, and if you are satisfied with what I turn over to you, that is the end of the business, without making a detailed report in the Probate Court of the amount of cash collected on the notes that I have inventoried.

Let me hear from you soon, so that by the time I finish my negotiations with the heirs I will know how to frame my report with the view of closing up the estate and getting my discharge as administrator.

All the notes can be collected except the little Stump note. The F - note may have to be partly traded out, but all the rest are as good as cash.

Respectfully,

M. T. Campbell

Exhibit 65

Topeka, Kansas 26th Aug. 1904.

Mrs. Fensky.

I am having a blessed good time over the rent of the rooms occupied by Coughlin. When I collected her rent the other day I supposed that was her last day & that the proposed new tenant (Simms's bro-in-law) could take possession at once as he had some of his things moved in. Laura went off to Ft. Scott, but it seems left a lot of things in the house & the new tenant would not assume possession until all her things were out. She returned yesterday to finish packing & when I went there this morning my merry time commenced when each of the women claimed the other had possession & neither of them liable for the rent. I told Laura

I would hold her liable for the rent up till today & that if she got all of the things out before night she would be released. She said the only things left in the house belonged to you & complained a great deal about the way she had slaved in trying to take care of the property without even thanks for it, much less any remuneration. I don't think she intends to pay the rent since the 15th inst, but I left her with the understanding that it would be claimed of her.

The proposed new tenant says the up stairs is over-run with bed bugs & that it will be absolutely necessary to do some papering up there. Laura says she built the chicken coop at her own expense & that it cost her \$7. She says the barn cost her \$75 & that it is hers. She recites many things that she has done about the place & with reference to your personal property that has cost her time, trouble & money & for which she has never received a cent of remuneration. I know she has done a great deal of hard work about the place, but I told her I supposed she included everything at least up to that date when you directed me to pay her bill. I don't want you to get a wrong impression about this matter.

I have had no racket with Mrs. C. although the talk this morning bordered closely on to a dispute. I want to know tho' from you how I must treat that barn. She says she wrote you all about it, but that you ignore her questions & her claims.

She talks this morning as if the care of your furniture was an imposition on her & as if it was my place to look after it, but I told her I had nothing whatever



to do with it – did not even know you had any furniture here till she told me. She evidently thinks you have not treated her fairly & I think it best to let you know the situation, for I know you do not intend to wrong her in any way. Simms I see does not care to take the whole house & so I did not tell him that he could have it at \$20.

I have Geo. Kimmerle at work on the laundry making the repairs Simms wants & when they are finished will make a 3 year's lease to Simm's & will do my best to have the expense of repairs come out of the indebtedness due from Simms & K – one or both of them. I tried first to get Stein to do the work, but he was not well enough. I wonder why Richter does not send on the assignment, Have not heard a word from him since I sent it to him through you.

I told you in my last card that Frederick decided not to sell out his interest, but I have hopes of him yet if all the others sell, as I feel sure they will. Return his letter herein enclosed, when you write.

There are only three more Add'n people that I care to take mtges from, – Hamrick, Schaeffler & Gutsch. The two last will take their deeds soon & the first in a month or two.

My shooting gallery man at 842 Ks Ave can't make it go & quits this month. Don't know whether I can rent it to Nystrom or not. Left word for him this morning to see me about it.

Be careful in writing to Laura that you do not prejudice her any more than she is already, ags't me. I don't think she has much influence with her father,

but I don't want to take any chances of her complicating our prospects of settling the estate. Keep me posted if Frederick writes you. Expect to hear from Germany in about 3 weeks.

Respy

M. T. Campbell.

Exhibit 68

Topeka, Kansas. 2d Sept, 1904

Mrs. Fensky:—

Oscar Krauss has just this moment left my office. He came to tell me that he had heard from Mrs. Wendt and that before my letter with the assignment reached her she had already applied to the American Consul there to look after her interests in the matter and that she did not feel it would be courteous for her now to execute the assignment without first consulting him— that she supposed he had written to America and would want to hear from here before he would know how to advise her. Oscar said she expressed herself as being sorry that she had not received his and my letter before, as she would have been willing to have accepted the \$1000 and executed the assignment if she had received it before she had put the matter in the hands of her lawyer and the consul. I still hope that it will turn out all right, but I hate to have inquiries made of the court here that may stir up a discussion about the matter, especially as Frederick is still balking and Richter delays in sending any assignment for his mother. I suppose there is nothing to do but wait for developments, and I write simply to keep you posted.

George tells me he starts to California tomorrow, and of course will call on you and tell you about times in Topeka.

Respectfully,

M. T. Campbell

Exhibit 70

Sept. 5, 1904, Topeka, Kansas.

Mrs. Fensky:—

Just now received yours of the 30th ult. with agreement for Volker which I will fix all right before delivering. Am glad of your explanation about the barn—guess there are two sides to this question.

In regard to the money, I keep my account at home and am writing this at my office, but am going to risk sending you now \$1000, and if you have to have more soon guess I will have to convert some of your addn mortgs. into cash.

Of course I have used estate money, \$5000, to buy out the five heirs who have made assignments, but remember that I am making these purchases as your agent and supposedly with your money and not as administrator of the estate. So that if I send you any estate money it is not upon the theory that I have made any distribution to the others, but upon the theory that the risk is so slight that I as administrator can afford to take that risk. I will prepare a letter for you to address to me, as a protection to me in case of a possibility of any question being raised as to my right to advance you any money before being so ordered to do by the court. After I receive your request I think

I will send you receipt to sign for \$5000, I have already advanced you to purchase the interests of Augusta, Louise, George, Charles and Johanna. It occurs to me just now for the first time that I had better send you such receipt in this. So sign and return it the next time you write. If you have any doubt about the correctness of my views about these matters be sure and consult Judge Goodrich before you act. I often wish I could talk to you about them face to face as we are all liable to be misunderstood when depending entirely on written communication. I feel sure tho' that you will appreciate that it is you and your money that is buying out the other heirs and that my connection with the transaction is not an administrator of the estate, but as your agent, just as I am acting in regard to your other individual property here.

M. T. Campbell

Exhibit 71

No. 292 Henrietta Court, Pasadena, Calif. Sept. 14, 1904.

M. T. Campbell:—

Topeka, Kansas.

Dear Sir:—

Your numerous letters, draft and P. C. received. I wish Mr. Campbell, often times that you and I could have a heart to heart talk, but we will have to be satisfied with writing, and be very patient and don't try to hurry matters too much. I do hope matters will come out satisfactorily yet. Don't tell Laura or her sister too much about the affairs. If you ever want



that surry it will be all right to take it from Foucht on what he owes. Mr. Campbell don't worry about the  $\frac{1}{8}$  of the  $\frac{1}{2}$  regarding Mrs. Pickens note. If we gave it to her we should have to give it to the others. I hope you can rent the store before winter, even if you have to rent it for little less. I wish you would figure up how much Mrs. Gibbons owes on the place yet. I wish she could get the money of someone else and take out her deed as I don't like to be worried about it. Also please give me the names of those who haven't taken out deeds yet. Has George Stoker paid their note yet? George F. and wife arrived in San Pedro last week. I have not seen them yet, but am going home tomorrow. Mr. Campbell as soon as you get in some (my own) money please send it to me as I need it. I had to borrow two hundred dollars.

Respectfully yours,

Mrs. F. Fensky.

Exhibit 72

Topeka, Kansas.

21st Sept, 1904

Mrs. Jeanette Fensky

San Pedro, Cal

Dear Madam;—

I have just this moment received your letter of 14th inst. enclosing one from Judge Goodrich, and this will serve as an answer to both. I think the Judge did not catch my idea when I wanted you to write me to advance you \$8000. You will notice I did not want you to date that letter. Because, as you will readily see, I wanted it to cover the \$5000 I have already

advanced in paying for assignments, and enough more to let you have what you needed for present purposes. It is all right for you to know beyond question that I have made such advancements, and therefore, as suggested by Judge Goodrich, I enclose you the five assignments taken from Charles, George, Augusta, Louise and Johanna: and for which advancement I want your receipt. Judge Goodrich says he sees no necessity for your sending me such a letter. But from my standpoint, I think it is quite necessary, as giving me a good excuse (in case of a possible contest in Court) for sending money to one of the heirs without any order from the court. With your request for the money and your promise to refund in case the court did not ratify my action, and in view of your unquestionable financial ability, I have no fears but what he would say that I was entirely justified in making the advancement. I would rather you had your share of the estate money than to hold it myself, but I must at least have your request that I send it to you, and if the court does not sanction it, that you will protect me. I cannot understand what Judge Goodrich means by saying the two papers would cover a liability of \$13000. The simple proposition is that you request me, as administrator, to advance you, out of the estate money as much as \$8000. Such a letter would amount to nothing from your standpoint and create no liability until I act on it and send you some money, and then your receipt to me would be the measure of your liability to the administrator in case of the possible (almost impossible) contingency of the court refusing

to sanction my advancement. Now I want the letter without date (unless you choose to have it bear a date prior to my first advancement) and then I want your receipt for \$5000 which will show that under and by virtue of your request I advanced you that much money.. And while it is not important to show how you used the money, yet it certainly can do no harm if it appears that you used it in buying out the other heirs. When I get such a letter I shall feel perfectly safe in sending you as much as \$3000 more of the estate money without asking the court anything about it. But if Judge Goodrich thinks there is any other possible construction can be put upon such a letter, or that you run any risk in any way in making such a request of me as administrator, then let the matter drop where it is. I thought it advisable to hold the assignments here, if for no other purpose than to show Frederick what the others had done and possibly thus to induce him to act reasonably in this matter. I think he is suspicious and thinks some of the others are getting more. It strikes me that after you have examined the assignments and recorded them there, if you think best, you had better return them to me. I may need them in court yet to show that such heirs no longer have any interest in the estate. And, by the way, I have made no showing in this court as yet that there are any other heirs besides you; and until it is fully demonstrated that we (you) cannot buy out the others, I don't want to make such showing. If the others sell out to you before the court cites me to make any report, I can make the costs of court here com-

paratively light. I have been expecting the Probate Judge to ask me some questions on the strength of inquiries from Germany. But possibly the consul there has not and may not write him at all. Anyhow I think it best not to anticipate it by making any inquiries in regard to the Germany sister. The Judge is busy trying to get elected again and I am hoping we will get assignments from the balance of the heirs before his attention is called to this estate.

Store room No. 842 Kansas Avenue is still vacant.

Gibbons still owes \$799, besides interest from 16th July 1903. He is the only one of the addition people to whom I have not offered deed. all the others except Frank Sawyer, George Hemmrick, and Casper Gettig (assignee of Etzel) have taken their deeds and given back notes and mortgage. They say they want to pay a little more on their contracts first, and I thought it best not to urge them too strongly.

Have collected the George Stoker note.

Enclosed find my check for \$300 on your individual account.

I think I will certainly hear soon from Richter, and when I do will promptly write you.

Let me hear from you again soon.

Respectfully,

M. T. Campbell

Exhibit 73

Topeka, Kansas, 7h Oct. 1904.

Mrs. Fensky.

This morning I rec'd the enclosed letter from Frederick's lawyer & answered it as per copy of my letter



also enclosed. I am very anxious to have you get a settlement with Frederick but it will not do to betray to him any anxiety. When we get assignments from Richter & the sister in Germany we can possibly afford to offer him more,<sup>4</sup> but not now.

Return the lawyer's letter when you write. I am expecting receipt every mail for the money spent for assignments.

Yrs

M.T.Campbell.

Exhibit 74

Topeka, Kansas.

7th. Oct, 1904

Arthur M. Jackson,

Lawyer,

Leavenworth, Kansas.

Dear Sir:—

I am confident Mrs. Fensky would not care to risk more than the \$1000 she has offered Frederick for his interest in the estate.

She did not think at first that she could give that much to each one and take all chances of collecting the doubtful claims and pay all the costs and expenses of administration. And if collection of the poor claims is attempted to be forced it is very doubtful about her getting back what she has paid the others for their shares. Mr. Krauss after an investigation of the condition of the estate, in behalf of his wife, came to the conclusion that the widow had made a liberal offer and very readily accepted it as did all the others except,

Frederick, and I am confident he would do so if he understood the real situation, but of course he cannot be justly blamed if he thinks it will pay him better to wait the result of due administration. Even if Mrs. F was willing to give Frederick more for the sake of becoming the sole owner of the property and making whatever terms she chose with the debtors it would hardly seem fair to the others, who have accepted the \$1000 and given her their assignments with the kindest expressions of hope for her success in closing up the estate without loss to herself.

Respectfully,

M.T.Campbell

Exhibit 76

11th Oct. 1904.

Mrs. Fensky;— Just now received the enclosed second letter from Frederick's lawyer, & answered it as per enclosed copy of my letter. I think you will "catch onto" the spirit & purpose of my answer -- in other words be able to read between the lines. If we only had the other two heirs out of the way we would soon get a settlement with Frederick, I think, but we need not be in a hurry with him till we know what the other two will do. It is evident that he and his lawyer think you are quite anxious to settle with him, and they are experimenting a little on your anxiety. Probably \$1250 is about what he expects you to offer.

I can't figure out why Richter delays so long and I don't hear anything more from Germany.

M.T.Campbell.

Exhibit 77

Oct 15, 1904

Box 1804, San Pedro, Calif.

M. T. Campbell, Esq.,

Topeka, Kansas.

Dear Sir:—

Yours of Oct 7th received and this is the only one I have rec'd for two weeks. I have forwarded you the receipt, also two insurance papers two weeks ago. Either they are delayed or lost through the floods. Now about Frederick; I think we will let it go at that for awhile as I don't know what to say in regard to it. I don't like to give him more. If I do I feel I will have to give the others more. I feel he is the one who ought to be more than satisfied at what I have offered him, as I kept his daughter two years and now I am raising his granddaughter, and have had her ten years. May be you could do some thing with the lawyer if he sees something for himself. Be sure and don't get us in trouble Mr. Campbell

Whenever you need the assignments I will send them to you *to you*.

Do try and rent the store as winter is coming, on, if you do even have to take lower rent.

How is Sims and the laundry?

As I have not written for so long, will say I hope yourself and family are getting along well

George F and wife will remain here sometime

Very Respectfully,

Mrs. F. Fensky.

P.S. Within you will find the communication from Mr. Jackson.

## Exhibit 78

Topeka, Kansas, 20th Oct, 1904.

Mrs. Fensky,

Received yours of the 15th instant (with Jackson's enclosed) this morning. I have also received the receipt you refer to & the Ins. policies. You have by this time received the other two letters I received from Jackson. The last one I did not answer at all. The same day that he wrote me the last one, it seems that Frederick wrote Krauss & Mr. Krauss bro't the letter up and showed it to me. The substance of it was that he had investigated the law & found that after the "expiration of the widow" all the real estate would descend to Ferdinands' bros & sisters. How's that for a legal opinion? Oscar had a good laugh over it & said he would invite Frederick to come over and investigate for himself and may be he would be better satisfied. I showed Mr. Krauss just what I had written to F's lawyer & he said everything seemed entirely fair & and rather advised ag'st giving F. any more than \$1000. He has heard nothing more from the Germany sister and the Probate Judge has not said anything to me about the matter, so if she referred it to the Am. consul or any lawyer over there *there* they are slow about making their inquiries.

Oscar said he would call the subject up the next time any of them wrote to her & he thought her assignment would yet come all right. I wish I had those assignments here in case Frederick calls on me. You don't express any opinion ab't the delay of Richter. What do you think of it? Can't you frame some good



excuse for writing to him and asking him without appearing too anxious?

Have had the Laundry fixed up somewhat to Simms' satisfaction and while I have paid for it I am trying and fully expect to get the money out of Simms on his note to meet the expense. Rented the Alley house without repairs at \$3.50 per month, but Simms telephoned me yesterday asking me who the tenant was and his tone indicated that he thought he was not all right but he said nothing ag'st him and so I have no idea what his objection, if any, is. I told him I knew nothing of the man, only his name, but if anything was wrong about him, I wanted to know it, and when I could conveniently do so I would call & see him about the matter. I have been a cripple for the last four or five weeks and when I take the car near home I stay on till I get to my office and therefore have not stopped at the laundry. I sprained my ankle very badly, but is getting better now. The tenants name is Lane and he said there were only his wife and him to occupy the house and from all my inquiries of him I learned nothing to arouse any suspicion against him and I don't believe there is anything against him, but if I find I am mistaken will put him out.

Will do the best I can to rent the store but so far nobody seems to want it. Quite a number in the same block have been empty for more than a year. I have heard of the tenant in 842 and  $\frac{1}{2}$  inquiring about rooms on the south side, but he has given me no intimation as yet that he intended to quit yours. The

only reason Nystrom talked about a change was to get away from a Joint close to his store, but his landlord reduced his rent & he can't do any better than to stay where he is.

If you hear anything from Richter be sure and let me know. The only thing that concerns me about Frederick is that he may go into Probate Court and have me cited to make a report, and then ask that what I have already collected to be distributed, or in other words have it disclosed that it may pay him a good deal better to take his share than to sell out. Whereas if you can become the sole owner of the whole estate before I am called upon to make a report, I can make my report a final report and get an order to pay over everything in my hands to you without necessarily disclosing to the world how much I have collected on the notes. A receipt from you for all notes and moneys in my hands would satisfy the court and entitle me to a discharge. But we need not anticipate. You did the right and the wise thing in buying out the others whether F and the other two sell out or not.

Yrs.,

M. T. Campbell

Exhibit 81

Topeka, Kansas, 15th Dec. 1904

Mrs. Fensky;—

I got your letter of the 12th instant this morning, and immediately wrote George to come and see me so that I could show him what you said about the laundry. I am in hopes he will accept the proposition and close

the matter up at once, in which case I will promptly remit the \$1000 he pays on the property. As you say you are needing money to pay for your Pasadena property I think I will take the chances of sending you \$1000, now, for which find my check enclosed and for which please send me receipt as you did before. I recently paid \$406.94 taxes, less the rebate, on the estate property, and I paid your taxes in full on Lot 61 and the north four feet of lot 64, and the S. 50 feet of Lot 66, and N. 30 feet of the S. 50 feet of lot 88, all on Kansas Avenue, North Topeka, and on the Welke tract in Reserve 5, amounting to all to \$162.72, less the rebate, and herewith enclose you the tax receipt for same

The Welke tract will sell now for no such money as you are asking for it, and I doubt very much that you can rent it for the price you ask.

Gibbons is only about a month behind on his payments for this year, but they could not possibly borrow the amount still due on the property from any one else and pay you off. (I don't think delay is prejudicing the Stump matter a great deal) I don't care to press any of them very hard as long as there is a reasonable show for you to become the sole owner of the notes and mortgages. And as there are only two more heirs to buy out it isn't important to press collections by suit until we know what we can do with Mrs. Wendt and Frederick. You have a better chance to buy them out before the notes are collected than you would have afterwards. If Frederick will only be decent in the matter and Mrs. Wendt will send her assignment I can save a good deal of costs in the Probate Court.

Wishing You good luck in your Pasadena purchase,  
I remain

Yours respectfully,  
M. T. Campbell

Exhibit 82

Topeka, Kansas. 24th Dec., 1904.

Mrs. Fensky;—

Enclosed find the Geo. Fensky Mortgage. I have been urging Simms to pay as much as \$40 or \$50 on his note, and I think he has made an honest effort to do it and possibly, can do it yet some time next month, but now he comes at me with a proposition that if you accept \$300 in cash by the 10th of next month in full for the note, he will borrow the money and pay it off. He finds that the chattel mortgage on record affects his credit and insurance rates, and as the Shawnee State Bank has promised to loan him the money at a reasonable interest, he has concluded to pay off the note and if he can do it with \$300. The balance due on the principal of the note is \$342.50 and the interest now due is \$23.95. I promised him to submit the proposition to you and hope you will answer promptly. I think if I were in your place I would accept the proposition. It will be years before confidence in North Topeka and in North Topeka Property is restored. And if the water overflows it again next year you and I will not live long enough to see property worth half as much as it was before the flood. I have been trying to find a buyer for 842 and 842 and  $\frac{1}{2}$ , but everybody thinks \$3000 too much. The alley back of them is to be paved soon which will add quite a little to the taxes



for the next ten years. Somebody has stolen the back screen door off 842 and I had all the others taken off yesterday, and I have put them away for the winter in my shed. I tried to get Kimmerle interested in buying the property but he is so discouraged at the prospect for the future that he has become a regular (old) pessimist. The way his property is situated tho' he ought to have yours and I tell him he could afford to give more for it than most anyone else. In case he should wake up I would like to know the very best terms and price I could offer him for you and hope you will let me know the next time you write.

Haven't heard anything more from Frederick and am disappointed that no further word comes from Germany.

Hoping to hear from you soon and wishing you a glad Christmas and a Happy New Year, I remain

Yours respy,

M. T. Campbell

Exhibit 83

Box 1804 -- San Pedro, Calif. 1-5-1905

M. T. Campbell,

Topeka, Kansas.

Dear Sir:-

I rec'd your letter with mortgage and notes from George and in reply will say by all means take the three hundred dollars from Sims as I don't think it very safe there. About the Paramore place the least I could take for that would be twenty-eight hundred dollars. I don't see how Mr. Kimmerle could buy it since he can't

pay the three hundred dollars which he owes me. But of course if he can pay enough to make it safe I say let him have it. I do wish we could settle with the heirs before the first of March, thereby saving the paying of any more tax for the "Estate". I have been in Santa Ana some over one week and in Pasadena for the "tournament of Roses." My health is fairly good now. Hope you are all well and enjoying the cold weather which I read of your having.

Yours very respectfully,

Mrs. F. Fensky

By Minnie W. Farnsworth

Exhibit 84

January, 9, 1905.

Mrs. Fensky:

You will remember that I sent you Jackson's letter as they came to me, and that I decided not to answer his last letter where he insinuated that some of us had stolen or suppressed Ferdinand's will and catechised me about the real estate he left. I hardly expected to hear from him again as I told him I did not think further correspondence necessary, and I think I sent you copies of the enclosed letter of January 6th in which you will see the fool still talks about a will. It made me so indignant that I drafted a long letter to him telling him I had a great curiosity to know what his client wanted to find a will for even if one had ever been made. But I found in reading it over that I had practically called him a fool and charged him with dishonesty toward his client, and then concluded as a mat-

ter of business policy, that I had better smother my indignation, and the result was that I did not send the letter but simply wrote him a card, saying, "Ferdinand Fensky left no will, and if anybody made any 'statements' to you that he did, such statements are untrue. Respectfully, M. T. Campbell, 7th January 1905." You now know all that he has written to me and all that I have written to him, and I am rather in hopes that the door is open again for negotiations with Frederick looking toward buying him out, even if you have to give him more than the others. If he gives me a good chance I intend to tell him to write to you and with your knowledge of our correspondence, you, under the advice of Judge Goodrich will know how to answer him without unduly prejudicing your right. I would like 'awful' well if we could settle with him before the 1st of March in order to pay the payment of tax. His fool lawyer I am satisfied has advised him that the real estate here descends the same as personal property, and so Frederick thinks "there's millions in it". Please return his letter when you write.

You of course, by this time, have received my letter containing the assignment of Mrs. Wendt and I think it most fortunate that we got it, as about an hour ago Mr. Bischoff stopped me on the street and told me a long story about "the American consul in Germany writing to him about Mrs. Wendt's interest in the estate and how he (Bischoff) had employed lawyer Slater here to look up the matter in our probate court, and to write to Los Angeles to learn the condition of

the estate in California and how he had come to the conclusion that your offer was about the square thing, etc. etc. etc.”; when I broke in with the information that I already had Mrs. Wendt’s assignment and her money was on the way to her, and, you bet, it was a great satisfaction to me to be able to say truthfully that I knew nothing whatever with his connection with the matter, and that Mrs. Wendt had had ample time and opportunity to consider the proposition before accepting the same, and that whatever fees he had earned in the matter he would have to look to her for the payment thereof. I could see that he was a good deal disappointed and claimed that he had been to a great deal of trouble and that Mrs. Wendt would have to pay him for it. I think in this whole matter I have been very fortunate in having the friendship and confidence of Mr. Krauss who I feel sure has advised the others to sell out.

Your letter of the 5th inst. in which you advised me to accept the \$300 from Simms and in which you offer the Paramore stores for \$2800 was received this morning. I just now telephone over to Simms and the answer came back that he will be ready to pay the \$300 very soon, probably tomorrow.

You say you do not see how Kimmerle can buy the place as he cannot pay the \$300 he now owes, and I think you are correct in your surmise. But I know that his boy and girl are earning good money and I hope they will have the gumption to buy themselves or help him buy it; as it will all be in the family anyhow no matter whose money buys it. I am going to



talk to him about it the first chance I have and if he should pay as much as \$200 or \$300 down on it and say \$20 or \$25 a month with interest at 8 per cent per annum, I hope you will make contract of sale with him. By the way, did you give him credit on his due bill for the \$10, balance due on barn? I have paid him cash for everything else he has done. There is now a dike thrown up immediately south of your first stone wall (I mean the wall nearest the house), 24 feet wide at the base, and 12 feet wide at the top, and fully a foot higher than the level of your yard, and extending from Kansas Avenue to some distance south of the Colored Presbyterian Church; leaving quite a ravine between your wall and the dike, but which in the course of time, I suppose, will be filled up level with the yard. I put in claim for \$100 damages for this, but the commissioners only allowed \$25 and I am not so sure but what that is about right.

In case Frederick fails to write to you, suppose you talk with Judge Goodrich and let me know the very most I may offer him in case he will not settle for \$1000 and still shows disposition to sell and assign his interest. If his fool lawyer knew anything he could go into our probate court here and have me cited to make a report which would show that I collected more money on these so called doubtful notes than perhaps he thinks I have; and for your interest I would rather not do that if I am not compelled to. If we can buy him out I will make you full and complete statement of all money collected, and then when you receipt for such moneys

and for balance of notes and mortgages in my hands the probate court will discharge me as administrator because there will be nobody else in all the wide world to object to it. In such a case I can save a good deal in court costs, and make my final report very short. In view of these facts you can afford to give Frederick more than he really ought to have in order to get an assignment. But I would not advise over \$1250 and would not offer him a cent more than \$1000, until we are sure that \$200 more, or less than that will settle his claim. If I hear again from him or his lawyer I will promptly post you. Let me know your ideas about giving him more than \$1000.

Respectfully,

M. T. Campbell.

Exhibit 85

San Pedro, Calif. Jan. 17, 1905

Mr. Campbell,

Dear Sir:—

I received your letters with assignments of Mrs. Wendt and the one with the check in. Judge Goodrich says we will have to record the assignments here so you will please send all the assignments to me. When I have them recorded I can send them back to you if you need them, but J. G. says he thinks the receipts will do as well; you can wait a little while yet before you send them, may be Frederick will come to time

You can give him \$1200 but I think you had better wait awhile and see if will take \$1000.

I have credited Kimmerle with \$10, I suppose since the dyke is built that they can't get down to the lower

lot at all. Where have they taken the dirt from?

Within you will find the receipt for Mrs. Wendt's \$1000, also the Jackson letter.

Did you collect any more money from Mrs. Rost? How are matters progressing?

Very respectfully,

Mrs. F. Fensky.

Exhibit 86

Topeka, Kansas, 24th Jan. 1905

Mrs. Fensky;

I just now received yours of the 17th instant with Jackson's last enclosed and your receipt for \$1000, and as requested by you I send you herewith the assignments from Hulda, Augusta, Johanna, Louise, Charles & George J to be recorded.

If Frederick sells out to you I think I will not need them here, but as yet I have heard nothing more of or from him. How would it do for you under Judge Goodrich's advice, to write him, being very careful of course not to complicate me in any way as ad'r? If Laura told me correctly, he thinks I am the one to blame and it might be well enough to let him remain under the impression that it is not to my (selfish) interest for him to sell out, but to have this matter hang on the full three years, but from your standpoint it makes a good deal of difference, since you have spent \$7000 to buy the others out, to save all the costs possible in order to come out even. Tell him that the debtors are writing you to reduce interest, give more time, throw off part of debt &c &c. (I have directed

some ~~one~~ who have applied to me to write you) and that if you had his interest you could make new deals with them and perhaps get out whole, but that surely under all circumstances he would not ask you to pay him more than the \$1000 that each of the others accepted. You might also mention that Ferdinand intended for you to have all his property and that had he not been cut down so suddenly, he would have given it all to you by will, but that as he did not have the opportunity to so express himself by will, you want to treat the brothers and sisters fairly, and all alike and that you hope he will see it to his interest as well as yours and accept the \$1000 and allow you to have the k's Ad'r discharged. If you should write him send me a copy of your letter

Yrs

M. T. Campbell

Exhibit 87

31st Jan. 1905

Mrs. Fensky;—

Enclosed find my check for \$3000 of the estate money and for which send me receipt.

Respy,

M. T. Campbell

P. S. Am anxious to know what you think or have done about my suggestion that you write Frederick.

Oscar Krauss called up yesterday to show me the receipt from Mrs. Wendt for the \$1000 sent her on the 4th of this month. Pretty quick trip for her draft for the winter season. He said she was quite sick and the



money came to her in a very opportune time. Mr. Bischoff tho' has sent on his bill for \$25.00 for his services. I am very glad we did not know of his services till she had accepted her money. Mr. Beachum the tailor notified me last evening that he could not keep the store room, could not make enough to pay the rent and he goes out today. The oyster man who rented the other store quit in about ten days, and whether the man who took his place intends to stay or not I will find out when I go for the Feby rent tomorrow. It seems queer that business does not revive in North Topeka, but there are only a few business men making anything. Many empty stores yet and most of them so ever since the big flood.

Yrs.

M. T. Campbell

Exhibit 88-A

Topeka, Kansas. 9th. Feb. 1905.

Mrs. Fensky,

San Pedro, Cal.

Dear Madam:--

I have just collected of George Jammer \$929.64 in full of his notes and mortgage, and herewith send you my check for said amount.

I received yours of 4th. inst. today, and am rather glad you wrote to Frederick, although I think you might have gone a little more into detail with him without prejudicing your chances for a settlement. Probably though, it will be time enough to do that when he answers your letter. I want him to know without your appearing to make the fact too prominent that had

Ferdinand made a will it was his intention to leave everything to you. It does not look now as if it were possible to buy him out and close up the matter before the first of March. But there will not be near as much in my hands to be taxed this year as last. You say you wish Mrs. Tuttle could make a new loan and pay off her mortgage. This is not wise from your standpoint as long as Frederick has his interest in the estate. When we get him out of the way then you can safely urge the payment of past due paper. But if it is converted into cash and he finds it out, he will be coming into court and asking for a division, and will get his \$1000 without selling out at all. The unpaid paper is one of the best arguments to use to induce him to sell out for cash, and let you run all the risk of collecting bad debts. So don't worry about the Tuttle mortgage. It is perfectly safe and you will get the money on it in due time if you can only buy out Frederick's interest at a reasonable price. I will hurry matters along to a close and render you a full account of everything if we can only get him out of the way. I don't want him to know how much cash I have already collected for the estate unless he compels me to disclose the fact by making me make a report to the court. If you do not thoroughly understand the point I am trying to make please consult Judge Goodrich whom I am sure will agree with my view of the matter. So far the court has said nothing to me about the estate since I filed my inventory, and as long as the court lets me alone it is to your interests for me to let the court alone until you buy Frederick out. If, and when, you buy him out, I

will soon get busy in the way of collecting the paper still unpaid. I am greatly disappointed that that old crank has caused us this delay, but there is no use in fretting about it—I have done the very best I could to bring the estate matters to a close in the easiest, quietest, most economical, and quickest way.

In regard to the old homestead property, the parties you refer to have greatly exaggerated the damage done by the building of the dike. In the first place, the dike is built under the statutes of Kansas which allow the taking of property for that purpose whether the owner likes it not; and in the assessment of damages the appraisers are allowed to take into consideration all benefits to the owner as a set-off to said damages. The parties whose property is thus affected are given an opportunity at the time the damages are assessed by the viewers to present their claims for damage; and those who do not thus present their claims are shut out entirely. I think you are the only one who presented any claim for damages, and at the time I did so for you I had not any idea just where the dike would be or how it would affect your property. But at a mere venture I presented a claim for \$100, and the viewers, after considering the benefit the dike would be to your property, allowed you \$25; and my honest judgment is that taking your old homestead altogether just as it stands now with the dike, it is worth more and would sell for more than it would without the dike. Anyhow, your only remedy after the allowance of the \$25 was to appeal from the decision of the viewers to the District Court, and have a trial there to see whether a jury of

twelve men would allow you any more than the viewers did. In no way could you stop the building of the dike. It would be only a question whether you could get any more money in the way of damages by appealing the case. If you did not get any more you would have all the costs to pay; and my candid opinion was and is that more people would testify that the dike was a benefit rather than a damage to the property. There is no ditch left for the river to wash deeper. The space left between the dike and your stone wall can easily be filled up with dirt making the general surface of your yard level with the top of the dike. So take with due allowance all stories told you about the dike damage. It could not be helped though, even if it were all true.

Respy

M. T. Campbell

Exhibit 88-B

25 Feby 1905

Mrs. Fensky

Just now got yrs with one you prepared for me to forward to Frederick if I approved of it. Am sorry to have to raise any objection to it, but there is one clause about the Addition property that I am afraid to risk & I therefore return the letter for you to make some change in it. I also return his letter. Should he treat the property conveyed as of the date each deed was signed, then I am afraid he will claim that the balance due on each lot, & which is now evidenced by notes & mortgages made to you, was & is personal property belonging to the estate. The fact is that



altho' the deeds were signed before Ferdinand's death, the title did not pass to the purchaser till the deed was delivered. The title did not pass to the grantee until after it descended to you by virtue of Ferdinand's death and of course as the title (the land) descended to you all the proceeds therefrom afterwards (& the notes mtges) were your individual property. So we want to treat the Addn property just as we do the Goff, the Pruessner & the Rost properties & just as tho' there were no contracts of sale in existence – simply treat all of it as real estate that Ferdinand died seized of & which went to you as his sole heir at law & of course which you can do as you please with. So I suggest that you change your statement about the Addn property as I have indicated, so that if he examines the records & finds the mortgages made to you on the property he will not be so apt to claim that they represent a credit that was due the estate from the Addn. people at the time F died. If Frederick should ever raise the question in court I think we can beat him but we want to avoid any contest if possible. I have had in view all the time the avoidance of any lawsuits, but I think it will not prejudice a settlement any with Frederick for you to say something like what I have penciled in regard to the Ks Adm'r. I half way think that his fool lawyer has prejudiced him ags't me & that if he thought he was beating or disappointing me it would be some inducement for him to agree to your proposition. Get your letter off to

him as soon as possible with some plausible excuse for your delay and keep me posted.

Yrs.

M. T. Campbell

Exhibit 88-C

Topeka, Kansas. 16th Mar. 1905.

Mrs. F. Fensky,

San Pedro, Calif.

Dear Madam: --

In view of the fact that you are now the only one interested in the administration and distribution of the estate left by your husband, I shall take early steps to close up the Kansas end of the estate and get my discharge as administrator. But before I file my report and ask for discharge I want to see if you and I can agree on my compensation as administrator of the estate; and if we can I will not ask the court to make any allowance for that purpose and will not make any more record for the inspection of others than is absolutely necessary. I know that you will get quite a little more out of the estate after allowing me what I want, than if you had not bought out the others and I believe the court will allow me more, if it is necessary to ask for an allowance, than I am asking you to agree to.

What I want as my compensation for services as administrator of the estate is the discharge of the \$1500-mortgage on my store described in my inventory as the Millice Mortgage (No. 1) if you say you will do this I will file my report stating in a general way that you have bought out all the other heirs, and

that you are now the only one interested in the distribution of the estate and ask that I be discharged when I produce to the court a receipt from you showing that I have turned over to you all the moneys, notes and mortgages, that came into my hands as administrator after paying the costs incident to the administration. Then I will make you a full and complete report of all collections and expenditures as administrator and send you balance of moneys in my hands as such and all uncollected notes and mortgages. And when you are satisfied that it is all right you can send me *send me* such receipt as will entitle me to my discharge.

My inventory will show the money, notes and mortgages in my hands at the time the inventory was filed, but since you are the only one interested in the collection of the paper, if you are satisfied and ask for my discharge I think it is no one else's business how much up to this time, has really been collected, and for your interest I think it best not to disclose it, for the inspection of the heirs who have sold out, unless the court required it. For one of the inducements for them to sell out was, the supposed doubtful collection of much of the paper and I see no good reason for showing them that they might have fared better not to have done so.

If you agree to my proposition I will want you to sign the enclosed satisfaction of mortgage as administratrix on the first line, leaving the second line for me to sign as the Kansas administrator if I should deem it necessary to make it a complete discharge. Enclosed I send you an exact copy of the inventory I

filed so that when I send you my report for collection and balance of notes and mortgages you can be sure that your receipt will speak the truth.

My account as administrator shows every cent I have collected for the estate and a copy of it in connection with the inventory and the notes and mortgages that I will send you, will enable you to see at a glance that you are getting back every note and mortgage and every cent that has not been legitimately expended. When the balance of the paper is again in your hands as sole owner thereof, of course you can make whatever arrangements you please about its collection. I feel very confident that should you conclude to send it to me for collection I can eventually collect every dollar of it.

Up to this time I have not credited myself as administrator with any of the estate money sent you or expended for you in purchasing assignments from the other heirs, for fear of a possible contest in court with Frederick, but now since there is no danger of being charged with wrongfully advancing you estate-money, I think I will transfer my credits from your individual account (which on its face would bring you largely in my debt) to the administration account.

If I do decide to do this it will be merely for the purpose of enabling you the better to see where and how the estate money was expended, and to separate the funds of the estate from your individual funds. Besides I want to get the estate matter settled and entirely out of the way before sending you a full report of my agency of your individual property.



Guess you had better send me the assignments. The court may require proof that the other heirs sold out to you. I will return them with Frederick's when I get out of court. If you accept my proposition and discharge the mortgage on my property I think I will send you a copy of my report as it will not be long and not much trouble to do so. I had the old home house reinsured yesterday in the sum of \$1000 and barn in sum of \$100 for three years and paid \$8.80 for it.

The stores 842 and 842½ are each rented now at \$16.65 per month but I had to pay \$15 for repairs on 842½. Mat Gamlowski has a little stock of shoes and his shop there now and I hope will do business enough to enable him to pay the rent. Eldridge, the lunch counter tenant in 842, seems to be doing a fair business and has paid his rent up to 1st. April. I paid a plasterer \$6 today for patching the plastering in Sims-basement. And the plumbers will have a bill for repairing water pipes in connection with pump in brick house. The old pipes were rotted out and it required a good deal of work and some plumbers' cussing to get the pump in working order, but the bill has not been presented yet and I have no idea what it will be. It was a job that I could not bargain for beforehand as the plumbers could not tell what was to do till they got into it.

Hoping to hear from you soon, I remain

Yours respectfully,

M. T. Campbell.

## Exhibit 90

27th Mar. 1905.

Mr. Goodrich

I am about ready to close up the Fensky estate here, and in my final report I shall ask the court to allow me out of the estate \$2100 as my compensation as administrator, and I think he will do it. If Mrs. Fensky under your advice does not choose to accept my proposition it will be all right with me. All I want her to do now is to let me know her decision by return mail. I knew it was to her interest to accept my proposition, but if she does not appreciate the offer I am entirely willing to take my chances with the court. There is nothing "dark" in my statement, and your insinuation that there is, is gratuitous and wholly uncalled for. Of course I have kept my account with the estate separate from my account with Mrs. Fensky and am ready to account for every cent received and paid out on each account. And I am entitled to a fair compensation from Mrs. Fensky for the work I have done for her individually and it has nothing whatever to do with my compensation as administrator of the estate. So please take notice that I will not accept the discharge of the mortgage on my property as payment in full for my services as administrator of the estate and my services for her individually. You seem to be in a humor for a scrap, and so far as you are concerned you can have it with me, for I am not accustomed to being treated as a robber. I never took a cent of Mr. Fensky in my life that I did not earn, and I shall certainly not wrong his widow out of a cent.

But I shall resent insinuations of double dealing from whatever source they come.

If Mrs. Fensky wants to discharge me now as her agent and her attorney in the case in U. S. Court, I am entirely willing that she shall do so, and will make her a fair proposition of settlement of my fees. But I want this discharge direct from her and not through you. I send this letter through Mrs. Fensky's hand simply because for some reason you did not choose to sign the letter of 21st inst. which I received from you today.

Respectfully,

M. T. Campbell

Exhibit 91

April 10th. 1905.

Mrs. F. Fensky,

San Pedro, Cal.

Dear Madam:

Your letter of the 4th inst. containing receipt dated 17th Mar. 1905, showing that up to that date you had received from me as administrator in all the sum of \$11016.10, just received. This receipt takes the place of all other receipts that you have given to me as such administrator up to that date, and I herewith return you all of said receipts except the first one for \$5000 which I have mislaid or lost, but which your last receipt and this letter entirely protects you against. Should I ever find it I will return it to you. I haven't been able as yet even to find the letter you sent it in.

My proposition to you was that you should discharge of record the \$1500-mortgage on my property as my compensation in full as administrator of the estate, and

I suppose that you accept the proposition when you say you will allow the claim of \$1500. But as there is now some interest due on the mortgage I would rather you would express *you* acceptance of the proposition in terms that cannot be misunderstood. I am not mistrusting you in the least, but when Mr. Goodrich undertakes to regulate my morals I want no ambiguity about what we agree to. So if you will say to me that as my compensation as administrator of the estate the mortgage on my property shall be satisfied of record that will settle that phase of the question, and I will hurry along the settlement of the estate as fast as possible.

Now in regard to my pay for looking after your individual property here, you must remember that the mere collection of money and sending it to you is only a part of what I have to do in the matter. There are many questions arising and will continue for some time to arise affecting your property rights here that require study, care, close attention and some legal ability to attend to properly. And it would be almost impossible to make charges on the basis of the value of services rendered in each individual matter without making the amount look entirely too large from your standpoint. So I thought that a fair basis for my charge for all my work for you of whatever kind and character up to the time we settle, would be a percentage of the money that I collect and transmit to you from whatever source it may come. And it seems to me that five percent of such collections would be entirely reasonable and fair to you. If, however, this strikes you as too much, I will say that I will give you



my services in the matter of the collection of the balance of the notes still in my hands as administrator of the Fensky estate free of charge until the 1st. day of January 1906. By that time we ought to be able to collect the Tuttle note and get the balance in such shape as will entirely satisfy you to give the parties more time. Even the Stump note can be collected, but it may have to be sued upon. Mr. Foucht has paid nothing for a long time except what he furnished Laura out of the store to make repairs on your house, probably twenty or twenty-five dollars. I would be willing to take his note, but of course not on its full face value. I believe he will eventually pay but must have time.

By the time I hear from you again I will have my accounts copied off and will be ready to furnish you same so that you may see just where all the money has gone.

Hoping to hear from you soon, I remain,

Yours respectfully,

M. T. Campbell.

P. S. Since I began this letter I have been notified by the                      this afternoon to argue my demurrer in the case against Rost, yourself and myself as ad'r.

M. T. C.

Exhibit 92

Topeka, Kansas.

11th Apr. 1905

Mrs. Fensky: -

On the 23rd of June 1904 I sent you statement of your individual account up to that date showing balance in my hands at that time due you of \$268.42.

I now enclose you herewith statement of account showing all monies received and paid out for you since that time and which shows balance now in my hands due you of \$1410.09. You will notice I have you credited on March 17" 1905 with \$11016.10—being the money used to pay for assignments of the other heirs. My account with the estate will show a debit on same date of same amount, as it was really estate money that I used. I will send you statement of that account later on, when I file my report as administrator in court.

You will remember the receipt you sent me for the \$11016.10 bears the same date.

My letter yesterday will clearly indicate what I think my charges should be for my services for you individually, but if you would prefer to pay me in notes rather than cash I will make you this proposition:

For the Foucht and Stump notes I will send receipt in full for all services for you up to date and for all services you may desire from me up to the 1st January 1906. If then you discharge the mortgage on my property and assign to me the Foucht and Stump notes you will have paid for all I have done and may do up to the 1st day of January 1906, as your agent and attorney, and as administrator of the Fensky estate. I am not "hankering" after those notes, and would a good deal rather have my pay in cash, but if the offer strikes you favorably you will know just what to depend upon and I will risk it. The time of service I state (up to 1906) will give you ample op-

portunity to arrange your affairs here and get some one else whose charges will be more satisfactory to you. I am not making this offer as an inducement for you to retain me till 1906 unless it is entirely satisfactory to you to do so. I am willing to quit whenever you say so and without any ill feeling toward you for discharging me.

I hope to hear from you promptly, for if I get the notes I shall expect to take new ones in their place and extend the time of payment to suit the makers. If my compensation as administrator is agreed upon I desire you to say to me something like this: "Mr. Campbell I accept your proposition in regard to your compensation as administrator of the Fensky estate, and as soon as the estate is closed and all monies, notes and mortgages left in your hands as administrator are turned over to me, I will receipt for same and discharge of record the mortgage now on your lot No. 88 Kansas Avenue, Topeka, Kansas -- it being understood, however, that the discharge of said mortgage shall pay also for all further services up to 1<sup>st</sup> January 1906 that you may render for me in collecting the remaining notes belonging to said estate". When I get such a statement from you I will file my final report in court and say nothing in it about compensation and ask to be discharged as admr as soon as possible.

Respectfully,

M. T. Campbell.

## Exhibit 93

Received of Jeanette Fensky as compensation in full for all services rendered the estate of Ferdinand Fensky, deceased, as Administrator thereof and for all services heretofore rendered her as her agent & Attorney, and for all services to be rendered by me for her up to the 1st day of January 1906, the assignment & delivery to me of J. W. Stumps note and mortgage, the J. H. Foucht note and the discharge of the Millice mortgage on lot 88 K's Ave, Topeka K's. And in consideration of said notes and mortgages I will attend to her business in Topeka, Kansas, as she shall direct up to said 1st Jan. 1906.

M. T. Campbell

## Exhibit 94

Topeka, Kansas, 22" April, 1905

Mrs. F. Fensky

San Pedro, Calif

Dear Madam;—

I rec'd your letter today of 18th inst. in which you accept my propositions in regard to fees and all is satisfactory. I have already sent you a copy of the Inventory I filed as administrator in the Probate Court. Now in order that you may know that all the monies, notes and mortgages mentioned in the inventory are properly accounted for I send you herewith statement of my account with the estate showing all receipts and expenditures of money up to this date and showing a balance of monies in my hands as Ad'r of \$2181.95. For this amount find my check enclosed.



I also send you all the uncollected notes and mortgages mentioned in the inventory (Except the Millice note and mortgage The Foucht note and the Stump note and mtge, which you intend for me to have) and consisting of note and mortgage on M. R. Mitchell, notes on Lukens (two) note and mtge on Hutchinson, note and mtge on Bausch, note and mtg on Tuttle & note and mtg on Sheetz.

By comparing the account and the returned paper with inventory you will see that you have received all the property and money belonging to the estate still in my hands and that all the other that was in my hands has been properly and legally expended. So please sign and send me the enclosed receipt showing that fact so that I may present it to the court and get my discharge. Return to me, when you are satisfied my statement is correct, the discharge of the millice mtge properly executed.

There will be some more court costs before I am discharged, but I can pay whatever it may be & charge the amount up to you in my future account. When tax paying time comes again, there some taxes also to pay on estate property.

I send you also herewith copy of proposed notice of my final settlement, copy of my proposed final report, and copy of the proposed judgment I shall ask the court to render. I enclose also form of my receipt that I am willing to give you. If it suits you return it when you write and let me know.

I have tried to make everything plain to you -- plain enough even to satisfy Judge Goodrich, and I hope

you will be satisfied with my effort in that direction even if you still think my charges steep.

I know they are not steep. I know I have saved you money, even after my charges are paid and feel that I have been reasonable and very fair with you. We need not discuss this question any further though, and I assure you I shall not feel at all ill natured toward you because you differ from me in your views about it.

Better return the notes and mtgs for collection. I would advise taking new notes to yourself, as there might be some question about discharging mortgages of record if you and I both are discharged as administrators.

Besides the check for the estate money, I herewith send you check for \$1500.00 of your individual money. Hereafter there will be no such distinction in the funds. My acc't will be with you only.

Hoping to hear from you again soon, I am

Yours Respy,

M. T. Campbell

Exhibit 96

Topeka, Kansas, 14th June, 1905

Mrs. Fensky,

I have just received yours of 9th inst. in which you ratify the taking and the sale of the new Tuttle Mtg. I knew I was doing the best thing for you, but without your express authority to reduce the interest it makes me feel better to have you say it is all right after it is done.

Of course you will have my later remittance by this time, and those I sent on the 9th, which makes the aggregate more than the \$5000 you desired. You have spoken twice about the Pruessner mtg. You forget we took no mtg from Pruessner. He still operates under the contract for deed and is quite a ways behind too.

Yes, I was discharged as Ad'r on the 6th instant (You will notice that the estate was at no expense for my bondsman and that the court expenses generally were small. It was a wise thing to buy out the other heirs)

yrs,

M. T. Campbell

Exhibit 97

Topeka, Kansas.

Mrs. Fensky: -

I have just taken from the Rosts 12 notes dated 15th April 1906, aggregating \$4000, and secured by mtg on Lot 61 Kan Ave. and have delivered to Sarah Rost the first deed signed by Fred & you, as also the last deed recently made by you. I promised to have abstract of Title bro't up to date for her. The first note is for \$250 due in 6 mos, the 2<sup>nd</sup> for \$250 due in one year -- in short these are 8 notes for \$250 each, payable every 6 mos -- then 4 notes of \$500 each payable every 6 mos -- the last one falling due in six years & all bearing 6 per cent interest payable semi-annually. What is the least I may offer these notes for sale for? I told Rost you might sell them, but the

margin of security is not large enough to make it any temptation for any one to buy.

Expect to take mtg from Volker soon and will find sale for it soon I think.

Respy,

M. T. Campbell

21st May 1906

Exhibit 100

No. 581-N Raymond Ave, Pasadena, Cal.

May 21 '08

Mr. Campbell,

Topeka.

In answer to yours of recent date will say that aunt Jennie is not well enough to broach the subject to her but Mr. Campbell when she was well enough she said she would take the three thousand which was sacrificing then considerable. I do not know when she may be able to talk business as regards further discount, as she lays all the time in a semi sleepy attitude and does n't say anything unless questioned & keeps her eyes closed. But if you can sell it for the three thousand the amount she decided to take she will sign it. 'Tis the discussion and worry that does her all up; so to speak. In signing she makes her cross before two uninterested witnesses and the notary. At least that is the way her application for widows pension had to be fixed up not long ago under the new law of April last. Poor aunt Jennie is in bad shape, and no telling for how long, No one is allowed in the room except the two nurses, and they have their hands full, as she is



just like a baby to do for; the bed and her clothing have to be changed many times daily. Dr. says this is caused not by her kidneys being affected but by her mind being affected.

Being you have charge of the business there—attorney and old friend of the family I thought best to explain.

I will also explain further as regards disposition of her belongings. Soon after A. J. took down she by deed and will disposed of it all to take effect at her death. Everything in Cal. by deed to her relatives, which are two sisters & a brother equally divided—also this home place to Corine Loveland (the grand niece of uncles who is here) & a store down town to myself. Everything in Kansas—that is mortgages and mortgage-notes by will to uncles nieces and nephews—18 in all, The note From Mr. Stein which is not secured by mortgage—to her two sisters & the one from yourself to Croine & myself. She has signed papers to that effect.

Mr. Ferguson has charge of the property & collecting of rents &c. and hands us a statement the first of each month.

Then here at home I have been keeping things up also—the correspondence, paying bills &c & then A. J. had my name attached to her bank book, so that in case of her death I could draw money pay bills &c.

I believe this will give you an understanding as to how things stand.

Mr. Campbell if in time—say four or six months from now, if A. J. don't improve & a guardian has to be

appointed—before what officer does it have to come? What are the fees? And does the Guardian have full charge of affairs or can it be only in part? I do hope sincerely it won't come to this, but it appears much like it Mr. Campbell.

In answer to your question about needing money; if this should run on this way, say for months or years— we shall have to have money from somewhere to go on—that is why A. J. thought she better take the three thousand & let it go. Our expenses are high considering Dr. & nurses bills etc. Nurses alone are twenty five a week. These last ones are a little less.

Sincerely Yours,

Mrs. Minnie Farnsworth.

Exhibit 101

25th May, 1908.

Mrs. Farnsworth;

When you say that your aunt said she would take the \$3000 I suppose it was when I wrote about the amount clear to her would be about \$3010. Since then I sent her \$330 & I herewith send you my check payable to her for \$2700 making in all for the mortgage \$3030. This is better than I expected to do when I wrote her about the Bradley offer on 3rd Mar. Let me know as soon as you receive the check. I wish now we had the Pruessner paper disposed of but suppose N. T. property will have to come up in value before it will "go".

To answer your question: Should a guardian be necessary the probate court is the authority to apply to.

The fees depend on what is done. The statutes of the state provide the fee for each act done by the court.

The guardian would have full charge & control of all her property, but any sale of it would have to be made under the order of the court & the guardian would have to report in writing to the court from time to time the condition of the estate.

Respy,

Matt Campbell

P. M. Mr. & Mrs. Bischoff left Sat last for Germany.

Exhibit 103

15" July 1908

Mrs. Minnie Farnsworth.

Dear Madam:

Just now received yours of 13" inst. inclosing statement signed by your aunt 10" Oct. 1907 in regard to my note. Whether this statement constitutes a valid transfer of the note to you and Corinne Loveland, may be questioned, inasmuch as it provides for the transfer to take affect after her death. Can't you say truthfully that she turned the note over to you--gave it to you-- before her death? Does she say anything about this note in her WILL? If not, that fact would be consistent with her transfer of the note to you before she died. In which case, there would be no question about its being your property and not a part of her estate. If you will send me the note and will knock off the interest since the 1st of June 1908, I will send you \$200 and a new note for \$800 dated 1st August 1908 payable to you or one to you for \$400 and one to Corinne for

\$400 running same time as old note. I am in no condition to pay the note now, but I would make some sacrifice to accommodate you and Corinne by paying some of it if I am sure that I will be protected by paying you instead of the administrator of the estate. I hope the note became yours and Corinne's absolutely before your aunt died. It is to your interest to have it so. And if so, the written statement is not needed and may be ignored. If you have to depend on that statement alone for your title I am afraid it does not accomplish the purpose. So far as I am concerned though, I am safe enough in paying it if it is delivered up to me whether I pay it all in money or part in money and part in new note. I was expecting to sell property to get money to pay the note, but this year's flood has knocked property clear out of the market, and I will have to wait a more opportune time to raise the money. Be sure and let me know whether your aunt's WILL refers to the note and whether or not you now control it. If the WILL Says nothing about it then I think she must have given it to you and Corrinne before she died, in which case no one had any interest in it but you and her; and if you want new note or notes I will make it or them upon conditions as above stated.

Since writing the above Mr. Stein has called at my office and stated that he was on the way to the post-office to mail a check to Mrs. Fensky as a payment on his note to her. But when I told him of her death, I think he changed his plan and will wait to hear definitely who his note now belongs to. See whether the WILL transfers his note or whether it was transferred by



your aunt to her sisters before she died. Let me hear from you promptly about my note.

Respectfully,

Matt Campbell

Exhibit 104

No. 344 N. Fair Oaks ave., Pasadena, Cal

July 21st 1908

Mr. Campbell, Topeka,

First please note the change in my address.

Yours duly rec'd Sunday and in reply Mr. Campbell will say, I have turned over both your letter and Mr. Steins to the administrator; he will write you before long. The Wellke heirs held another conference yesterday P. M. Now regarding the note personally I will agree to your suggestion of each receiving one hundred dollars now and take new notes of four hundred each dating from the first of August next. But I cannot speak for Corine. The administrator will see her & inform you accordingly.

I will also write Mr. Stein. I am sorry I overlooked asking you to also inform them of aunt Jennie's death as well as the relatives there. They seem to feel hurt. I had so much to attend to at the time I wonder I did as well as I did.

We are having a very hot spell now & with business on hand one feels the heat more.

I sincerely hope this will be all settled up as peaceably as possible and I believe it will. Some time is required though to get together and understand the whole thing. Mr. Campbell you asked me if I had the note in my possession before aunt J's death.

Yes, when she signed the letter last fall she told me to take it and the note.

When you see the will or a copy of it (which the administrator I think will send you) you will readily see that only notes secured by mortgage are included in it.

Sincerely yours,

Mrs. Minnie Farnsworth

It was further stipulated, admitted and agreed that the following are true and correct copies of certain entries made by Matt T. Campbell in a diary kept by him in his own handwriting during his lifetime, the same being made under the dates as shown on the said copies. The same were offered and received in evidence, as follows:

Tues. 29th, Sept. 1903

Rec'd contracts for deeds from Goodrich Mrs. Fensky's attorney. Wrote Mrs. Fensky asking her if the Stien notes did not belong to her and cautioning her to call her lawyer's attention to all cases where notes had been turned over to her so that they would not be treated as part of her late husband's estate.

Mon. 5th Oct 1903.

I left receipts at the Citizens State Bank for the Fensky money--one for \$888.82 & one for \$27. Later in the day the bank sent in draft payable to Jeanette Fensky for \$886.57 & draft payable for me for \$27, having charged \$2.25 for cost of exchange and wrote me that it still had a balance in its hands of \$25. I then discovered that I had made a mistake when I left

my receipts & will correct it tomorrow. The bank has \$27 more instead of \$25 as I understand.

Wed. 28th Oct, 1903.

Wrote a postal to J. V. B. Goodrich telling him I was treating the Simms' note as belonging to Mrs. Fensky-- that Laura Coughlin wanted money for expenses-- that would ask Surety Co. to go my security & would have charge taxed up as costs in the administration-- that the Add'n people were not taking their deeds as readily as I would desire &c &c.

Mon. 23<sup>rd</sup> Nov. 1903

Received letter from Mrs. Fensky and wrote her card before I left my office. On the way home had a talk with Mrs. Pickens about the Fensky estate & after I came home wrote Mrs. Fensky again a long letter, & set out in full my reasons for having the addition people take their deeds.

Thursday 7th Jan. 1904

Had a settlement with Frank Simms of the Fensky matters. His claims against Fensky for repairs on building was \$416.90 & Fensky's claims against him was for cash, \$100 & six months rent up to 1st Jan. 1904 \$210, making total of \$310, which left balance in his favor of \$106.90. This was applied on his \$420 note due Fensky, as follows, \$29.40 in full of one year's interest up to 20<sup>th</sup> Dec. 1903 & \$77.50 on the principal of said note.

Thurs. 23<sup>rd</sup> June, 1904

Had a talk this evening with Oscar Krauss in regard to the Fensky estate, and arranged for him to examine inventory of property about the middle of next month

with a view of his advising the brothers and sisters of the deceased to sell their interest in the estate to Mrs. Fensky, the widow.

Thurs. 14th July 1904

Had a talk with Oscar Krauss about the Fensky estate, and wrote Mrs. Fensky asking if it was all right to pay each heir \$1000 for his interest in the estate.

Thurs. 4th Aug. 1904

Made my check on The Shawnee State Bank payable to myself for \$1000, for which the Bank handed me Draft for \$1000, payable to myself. I got this to endorse it over to Mrs. Johanna Schutt when I received her assignment to J. Fensky of her interest in the Fensky estate, and which I fully expected to receive today but it did not come.

Thursday, Jan 12th, 1905

Collected \$300 of Frank Simms in full of Fensky note. Wrote Mrs. Fensky & sent her check for the \$300.00. Cold weather. Discharged of record the Simms chattel mortgage, simply signing the discharge "Fensky, per M. T. Campbell, agent.

Tues 31st Jan, 1905.

I made a check for \$4297.14 as administrator of Fensky estate to myself individually & thus closed out the acc't that I started with the Shawnee State Bank as Ad'r on Sept 11th 1903, but which I did not follow up as ad'r. I deposited the same check (less the 14 cts) and \$15 in currency, total \$43412, to my individual credit. I wrote Mrs. Fensky & sent her my check for \$3000.00 of the estate money & requested her to send me receipt for same.



Wed. 15th March, 1905.

This morning the State Savings Bank presented me a sight Draft for \$1100 payable to the order of Wulfe-kuhler State Bank of Leavenworth, & attached to it was the assignment of Frederick Fensky's interest in the estate of Ferdinand Fensky to Jeanette Fensky. This is the assignment that Frederick signed in my presence last Monday. It was delivered to me & I made my check to The States Savings Bank for the am't plus the cost of exchange, to wit for \$1101.10.

I immediately wrote Mrs. Fensky a card telling her what I had done. She has now bought out all of the other heirs, and in doing so, thro' my instrumentality, I have spent for her \$8016.10

Tues 25th Apr. 1905

Left seven notes, amounting in all to \$900, with J. H. Foucht to be executed by him & his son & daughter to me instead of the Fensky note on him which I took of Mrs. Fensky on my fee. Besides these notes he owed on his old Fensky note \$13. This amount he gave me credit for on store acct.

Thurs. 30th May, 1907

Received a letter from Mrs. Fensky in which she said she would loan me \$1600 of her money on my own terms.

Sat. 1st June 1907

Sent note signed by me & wife to Mrs. Fensky for \$1000, due in three years from this date, bearing 6 pr ct. int.

\$1000.00                      Topeka, Kansas, 1st June, 1907.

Three years . . . . . after date we promise to  
pay to the order of Jeanette Fensky

LAW OFFICE of M. T. Campbell, in Topeka, Kansas,

One Thousand . . . . . Dollars  
with interest at Six per cent per annum from date until  
paid, Value received. We reserve the right to make  
payments on principal at any time before due.

M. T. Campbell.

Louise A. Campbell.

Wed 6th May 1908

Sent Mrs. Fensky my check for \$60 to pay one years'  
interest on my 1000\$ note to her made 1st June 1907.

Thurs. 14th May 1908

Received letter from Mrs. Minnie Farnsworth with  
receipt from Mrs. Fensky for the \$60 interest I sent  
her on 6th instant. Mrs. F. is very sick.

Fri. 15th May, 1908

Wrote Minnie Farnsworth requesting her to ask  
Mrs. Fensky if she would accept \$2700 for her Rost  
Mortgage.

Tuesday 19th May, 1908

Sold the Rost-Fensky mortgage to J. R. Mulvane  
for \$2965, & indorsed all the notes with Mrs. Fensky's  
name.

Mon. 25th May, 1908

Sent Mrs. Fensky my check for \$2700 in full of Rost  
Mortgage recently sold to J. R. Mulvane after deduct-  
ing charges.

Sun. 31st May 1908

Rec'd letter from Minnie Farnsworth acknowledging receipt of \$2700, & thanking me for Mrs. Fensky.

Sat. 20th June, 1908

Received letter from Minnie Farnsworth in which she says Mrs. Fensky is no better & asking about the appointment of a guardian for her estate.

Mon. 27th July 1908

Rec'd a letter with copy of Mrs. Fensky's will from Lawyer J. H. Merriam of Pasadena, Wrote him a card telling him to meet me in Los Angeles 10th Aug.

Tues. 4th Aug. 1908

W. C. Stien handed me draft for \$. . . . . to be delivered to J. H. Merriam of Pasadena, in payment of his note to Mrs. Fensky, who died last month. I am doing this as an accommodation to Mr. Stien, who knows I start tonight for California. In view of paying \$200 on my note of \$1000 made to Mrs. Fensky on 1st June 1907, I drew that much by check from Bank of Topeka to take with me.

Sat. 8th Aug. 1908

Went over to Pasadena & met Minnie Farnsworth & Corinne Loveland in J. H. Merriam's law office where I took up my \$1000 note made to Mrs. Fensky, and paid \$100 to Mrs. Farnsworth & \$100 to Corinne and gave each of them note signed by myself & wife for \$400.00 due in two years from 1st Aug. 1908, with interest at 6 per ct. payable annually. Delivered the Stein Draft to Merriam & took up his note & mailed it to him at Topeka. Went back to Los Angeles in afternoon.

Tues 11th Aug. 1908

In afternoon Mr. J. H. Merriam called at Hollenbeck with Mr. Wm. Thompson, one of the Fensky heirs, to see me. Took lunch with them at the Hollenbeck. Thompson is the husband of one of Mrs. Fensky's nieces & I told him about the Kansas-Fensky affairs.

It was stipulated, admitted and agreed that the following are full, true and correct copies of entries made by Matt T. Campbell in his own handwriting during his lifetime in a certain account book or ledger of business transactions kept by him, all of which were offered and received in evidence as follows:



Ledger page 200

## FENSKY ESTATE

1903

Sept 10To cash p'd for recording  
assignment & discharge  
of the Stoker MtgesSept 10  
" 28

4297.14

By cash Stoker Mtges  
" " Amos Hutchinson

1.50

Oct 20

" " M. R. Mitchell

119.25

Nov 3

" " " for recording  
assignment of Carter Mtg

" 24

" " E. D. Jones

150.00

" 5

" check to Probate Judge

" 26

" int. Mrs. Tuttle

110.50

Dec 1

" cash for release of Car-  
ter Mtg.

Nov 12

" " Buechner

81.25

" 2

" discharge of Petri Mtg

" 21

" " J. S. Carter

57.50

1904

" " " since Nov. 16.

Dec 1

" " Carter note

48.75

Mar 31

" discharge of Buechner Mtg

" 1

" cash Carter per  
Hillyer in full

3.75

May 10

" discharge of Root

" 2

" cash of Petri

1500.00

June 25

" cash p'd M & B for pub.  
Adv' notice

" 11

" int Alonzo Wardal

410.50

Aug 13

" discharge of Hauschild  
Mtg.

" 14

" " Jos. Bausch

32.00

" 31

" " " in full

" 16

" cash W. C. Stadel

60.00

1904

" " int Kate Hauschild

" 31

" " " in full

364.50

Feb

" " " of Root

" 31

" " " of Root

5.25

15.00

Nov 30	To cash for copy of complaint in U. S.	2.75			cash J. W. Rigdon	32.00
Dec 12	" pay int. of 1904 taxes	406.94			int F. A. Tuttle	81.25
				Mar 2	" John Sheetz	12.00
				" 7	cash Jacob Bausch	216.00
				" 9	int. M. R. Mitchell	47.50
				" 28	Amos Hutchinson	15.75
				Apr 1	cash Buechners in full	1535.00
Mar 17	To cash p'd Jeanette Fensky	11016.10		May 10	cash F. A. Root in full	508.30
				June 2	" Geo. Stoker in full	575.15
	To balance	2181.95		" 15	int. of Lukens	105.00
				July 6	" " Tuttle	81.25
				" 11	cash in full of Wardal	1356.85
				Aug 13	" Hauschild in full	156.25
				" 29	int John Sheetz	12.00
				Sept 13	" M. R. Mitchell	47.50
				" 26	" Hutchinson	15.75
				Oct 5	cash	50.00
				Nov 26	cash of J. E. Bausch	318.06
					Int in full J. E. Bausch	42.06
				1905		
				Mar 1	cash to John Sheetz	312.00
				" 13	Int of Mitchell	47.50
				" 15	" " Lukens	35.00

" 15	" cash "	Lukens	500.00
" 27	" int. of	Hutchinson	14.00
" 28	" " "	Tuttle	30.00
Apr 13	" " "	Tuttle	51.25

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13635.49

Apr. 22 To check to Jeanette Fensky 2181.95

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1905 1905 Ledger page 201

To Amt Brt Frd 11453.54

Apr 22 To check to Jeanette Fensky 2181.95

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13635.49

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# JEANNETTE FENSKY

1903 1903 Ledger page 175

Sept 21	To cash for Kafton abst	2.00	By cash of J. C. Kafton	787.87
" 21	" check	100.00	" Sept rent R. J. Beachum	16.66
Oct 2	" "	21.25	" returning 16th July ck	12.50
" 2	" Arnold Drug Co glass	2.46	" " of Phillips ck	8.75
" 6	" Drft from Cit St Bank	886.57	" drft Cit St Bank	886.57

"	6	"	"	"	Cit St Bank	27.00	"	5	"	"	"	27.00
"	12	"	"	"	check to Morse Crtg. Co.	152.65	"	7	"	"	rent of Beachum for str.	16.75
"	13	"	"	"	check to H. C. Miller for coal house	22.69	"	14	"	"	cash of Louis Schaffer	12.00
"	16	"	"	"	" to Hunter for papering	8.75	"	14	"	"	" Frank Gutsch	10.00
"	26	"	"	"	cash for recording Lippert Mtg	1.00	"	15	"	"	" Frank Sawyer	10.00
"	28	"	"	"	Lippert abst	1.00	"	15	"	"	" Geo. Jammer	10.00
Nov	11	"	"	"	p'd W. H. Long for repairs on Quincy St. home	4.20	"	15	"	"	" Camille Van Laey	12.00
							"	16	"	"	" Geo Brosamer	15.00
							"	16	"	"	" W. L. Havens	12.00
							"	17	"	"	" Jos Walker	15.00
							"	17	"	"	" John Diets	8.00
							"	17	"	"	" Maurice Sawyer	10.00
							"	17	"	"	" Reed Saylor	10.00
							"	17	"	"	" Jacob Fink	10.00
							"	17	"	"	" John Domme	10.00
							"	17	"	"	rent Fred Volker	9.00
							"	20	"	"	cash of Frank	20.00
							"	23	"	"	" Geo. Hamrick	10.00
							"	26	"	"	" E. Rost	15.00
							Nov	2	"	"	" J. B. Gibbon	12.50
							"	2	"	"	int. M. G. Tracey	13.45
							"	5	"	"	cash E. Rost	15.00
							"	6	"	"	Nov. rent Beachum	16.65
							"	6	"	"	bal. Nov. rent Knoll & Huff	9.10



"	10	"	cash	Reed Saylor	10.00
"	14	"	"	Frank Gutsch	10.00
"	16	"	"	W. L. Havens	12.00
"	16	"	"	int.	21.30
"	16	"	"	Cash C. Van Laeys	12.00
"	16	"	"	Frank Sawyer	10.00
"	16	"	"	Jno Deitz	8.00
"	17	"	"	Geo Brosamer	15.00
"	17	"	"	Mike Etzel	10.00
"	17	"	"	Louis Schaffer	12.00
"	17	"	"	Stamm	5.00
"	17	"	"	Mollie Grant	17.50
"	17	"	"	Jno Sell	12.00
					<hr/>
					2175.60

## JEANNETTE FENSKY.

1903

Nov. 20	To amt. forward	1229.57
"	To cash for recording Hav-	
"	ens Mtg	1.00
"	cash for Havens Abs.	1.00
"	pumps for stores	8.50

1903

Nov 18	By amt brot forward	\$2175.60
" 18	By rent of Fred Volker	9.00
" 18	cash of G. H. Baxter	30.00
" 18	int. of Jos. Walker	30.80
" 18	cash of M. Sawyer	9.00

Ledger page 176

"	27	"	Van Lacy & Walker Abs.	3.00	"	19	"	"	"	J. B. Gibbons	12.50
"	28	"	recording Lany Mtg	1.00	"	22	"	"	"	Jno Domme	10.00
Dec. 14	"	"	Walker Mtg.	1.00	"	22	"	"	"	Geo. Lippert	40.00
"	9	"	cash of taxes of 1903	235.48	Dec.	2	"	"	"	M. G. Tracey	10.00
"	9	"	" for 3 yrs ins. on		"	8	"	Dec.	rent	J. R. Beachum	16.65
"		"	842 K	10.00	"	8	"	"	"	Knoll & Huff	16.65
"	11	"	paid for repairs to Myers	.25	"	10	"	Cash	of	E. H. Stamm	10.00
"	16	"	" for lumber	4.20	"	15	"	"	"	Frank Gusch	13.22
"	14	"	" Dustin taxes	15.98	"	15	"	"	"	Louis Schaffer	15.14
"	17	"	" Brosamer Taxes	56.75	"	16	"	"	"	Geo. Jammer	20.00
"	17	"	" to Frank Smith, re-		"	16	"	"	"	Reed Saylor	10.00
"		"	pairs	8.67	"	16	"	"	"	Geo. Brosamer	15.00
"	17	"	recording Dustin Mtg.	1.00	"	16	"	"	"	Henry Frank	20.00
"	21	"	Geo. Brosamer Mtg.	1.00	"	16	"	"	"	F. Folker	9.00
"	21	"	cash for Jno. Brosamer		"	19	"	rent	of	Topeka Rw. Co	25.00
"		"	taxes	88.48	"	21	"	cash	of	Maurice Sawyer	5.00
"	19	"	check Mrs. Raymond	5.00	"	28	"	"	"	J. B. Gibbon	12.50
"	19	"	" Mary Roberts	5.00	"	28	"	1902	taxes	of Gibbons	8.50
"	22	"	recording Saylor Mtg	1.00	"	28	"	cash	of Gibbon on		
"	22	"	Saschee house-ins.	7.50	"		"	1903	taxes		1.50
"	22	"	3 yrs. ins. on 842 Ks Ave	10.00	"	29	"	"	"	E. Rost	15.00
"	22	"	check	500.00	"	31	"	"	"	Frank Sawyer	10.00



Mch.	2	"	recording Tracy Mtg	1.00	"	19	"	cash	"	Mollie Grant	10.00
"	2	"	cash for Tracy abst	1.50	"	21	"	"	"	Henry Frank	70.00
"	5	"	chk to Laura Coughlin	52.46	"	22	"	"	"	J. W. Sager	
"	5	"	" " Tpp. Cap. Co.	4.00	"					assignee of M. Sawyer	8.00
					"	23	"	"	"	on taxes Jno. Brosamer	44.00
					Feb	1	"	"	"	Mrs. J. B. Gibbons	12.00
					"	1	"	"	"	rent of Knoll & Huff	16.65
					"	3	"	"	"	G. A. Baxter	10.00
					"	4	"	"	"	rent of Simms	70.00
					"	5	"	"	"	Warren	8.00
					"	9	"	"	"	J. R. Beachum	16.65
					"	15	"	"	cash	of Reed Saylor	20.00
					"	15	"	"	"	Frank Sawyer	5.00
					"	15	"	"	"	Louis Schaffer	22.00
					"	15	"	"	"	Frank Gutsch	13.11
					"	15	"	"	"	J. B. Gibbons	13.00
					"	15	"	"	"	Wes. Sager	8.00
					"	15	"	"	"	Geo. Hamrick	10.00
					"	16	"	"	"	John Deitz	10.00
					"	16	"	"	"	Mike Etzel	20.00
					"	16	"	"	"	Henry Frank	10.00



"	16	"	"	"	John Domme	10.00
"	17	"	"	"	M. G. Tracey	10.00
"	17	"	"	"	Jno. Sell	12.00
"	18	"	"	"	Geo. Jammer	10.00
"	18	"	"	"	rent of Fred Volker	9.00
"	20	"	"	"	cash of Jacob Fink	5.00
"	20	"	"	"	on taxes John Brosamer	44.48
"	20	"	"	"	int. of Jno. Brosamer	43.38
"	22	"	"	"	cash " Mollie Grant	6.00
"	23	"	"	"	int. " Sarah Rost	133.05
"	24	"	"	"	cash " Sarah Rost	25.00
"	29	"	"	"	Mar. rent of Warren	
Mch	1	"	"	"	Repair 1.20	6.80
"	1	"	"	"	of Simms	35.00
"	1	"	"	"	Knoll & Huff	16.65
"	2	"	"	"	Beachum	16.65
"	2	"	"	"	cash of Tracey	10.00
"	8	"	"	"	" Rost	25.00
"	15	"	"	"	" Gutsch	13.07
"	15	"	"	"	" Schaffer	23.21
						<hr/>
						3611.81

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2257.34

Ledger page 178

JEANNETTE FENSKY

1904

Mch 26	To Amt. Brt Frd	2257.34
Apr 4	To ck Top Roof Co.	22.50
" 11	" cash Baxter Abst.	1.50
" 25	" chk	1000.00
" 25	" loan to Meder	425.00
" 25	" Recording Meder mtg.	1.00
" 25	" " Jno. Brosamer	
"	" mtg	1.00
"	" Fink abst title	1.50
" 30	" ck W. C. Stein-ins. plt.	
" 30	" " K. B. Herrman	5.30
May 5	" recording Fink mtg	6.50
		1.00

1904

Mch. 15	By Amt Brt Frd	3611.81
" 15	By cash W. Sager	8.00
" 15	" " Frank Sawyer	5.00
" 15	" " Jno Dietz	10.00
" 15	" " Casper Gettig	20.00
" 16	" " Hammrick	10.00
" 16	" " Jno Sell	12.00
" 18	" " Henry Frank	15.00
" 18	" rent Fred Volker	9.00
" 19	" cash Geo. Jammer	10.00
" 21	" " J. B. Gibbon	10.00
" 25	" " Jno. Brosamer	10.00
" 25	" " Mrs. M. S. Grant	6.00
" 29	" " Sarah Rost	20.00
Apr. 1	" rent R. J. Beachum	16.65
" 1	" " Frank Simms	35.00
" 1	" " Warren - repairs	
		1.50.
" 4	" cash Geo. Brosamer	6.50
" 11	" " for strip	50.00
" 11	" " G. A. Baxter	1126.00

"	12	"	"	Reed Sayler	10.00
"	"	"	"	Deitz	10.00
"	15	"	"	Schaffer	19.81
"	15	"	"	Gutsch	13.02
"	15	"	"	Domme	10.00
"	15	"	"	Gettig	15.00
"	16	"	"	Wesley Sager	8.00
"	16	"	"	Jacob Fink	10.00
"	18	"	"	Jno Sell	10.00
"	18	"	"	J. B. Gibbons	15.00
"	18	"	"	H. Frank	10.00
"	18	"	"	rent Volker	8.00
"	19	"	"	cash J. H. Brosamer	40.00
"	19	"	"	" Mrs. Grant	6.00
"	19	"	"	" Geo. Jammer	10.00
"	20	"	"	rent Ths. Coughlin	23.00
"	25	"	"	" Booher	1.00
"	30	"	"	cash S. Rost	20.00
May	2	"	"	rent Beachum	16.75
"	3	"	"	cash John Domme	10.00
"	3	"	"	rent Simms	35.00
"	5	"	"	" Booher	8.50
					<hr/>
					5300.04

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 3722.64





“	2	rent Beachum	16.65
“	2	“ Boohar	15.00
“	3	cash Gibbon	2.50
“	3	rent Simms	35.00
“	11	cash Reed Saylor	10.00
“	13	rent Boohar	1.65
“	15	cash Schaeffler	17.65
“	15	“ Gutsch	12.91
“	15	“ Geo. Brosamer	77.27
“	15	“ Casper Gettig	20.00
“	15	“ Frank Sawyer	10.00
“	17	“ M. S. Grant	10.00
“	17	rent Volker	8.50
“	20	“ Coughlin	10.00
“	21	“ cash Gibbon	10.00
			<hr/>
			5860.31

Ledger page 180

5860.31
368.42
123.60

## JEANNETTE FENSKY

1904

1904	To Amt Brt-frd	5860.31
Jun. 23	To cash Frank Abst	2.00
“ 29	“ “ Deitz Abst	1.50

Amt Brt Frd	
Jun. 23	By balance (see 179)
“ 23	“ cash Henry Frank

"	29	"	"	"	P'd Stein for 1/2 days work	1.50	"	24	"	"	John Brosamer	30.00
"	30	"	"	"	recording Deitz Mtg.	1.00	"	25	"	"	Henry Frank Abst	.50
Jul	"	"	"	"	ck Laundry Ins.	28.08	Jul	1	"	"	M. G. Tracy	20.00
"	"	"	"	"	ck Jno. Domme	100.00	"	2	"	rent	R. J. Beachum	16.65
"	6	"	"	"	recording Domme Mtg.	1.00	"	2	"	"	C. C. Booher	10.10
"	6	"	"	"	" Jammer	1.00	"	2	"	"	Simms	35.00
"	6	"	"	"	" Welke deed	1.00	"	5	"	cash	E. Goff	22.50
"	20	"	"	"	cash returned D. Dustin	1.20	"	5	"	rent	W. B. Warren	8.00
"	20	"	"	"	" discharging Mtg.	5.00	"	15	"	cash	Casper Gettig	20.00
"	27	"	"	"	Abst Quincy St. lots	.25	"	15	"	"	Schaeffer	17.57
"	28	"	"	"	Chas. Fensky assignment	5.50	"	15	"	"	Gutsch	12.86
"	"	"	"	"	(Est m)	1001.00	"	15	"	"	Deitz	14.00
"	29	"	"	"	Louise Pickens Assignment	1001.00	"	16	"	rent	Booher	.65
"	30	"	"	"	(Est m)	911.00	"	16	"	cash	Frank Sawyer	10.00
"	"	"	"	"	Augusta Krauss assignment	1000.00	"	16	"	"	M. S. Grant	10.00
Aug.	5	"	"	"	Johanna Schutt	1000.00	"	20	"	"	Benj. S. Dustin	247.52
"	6	"	"	"	(Est m)	1000.00	"	20	"	rent	Fred Volker	9.00
"	8	"	"	"	discharge Stamm Mtg.	.25	"	23	"	cash	Hemrick	10.00
"	15	"	"	"	Welke house Ins. 3 yrs.	10.50	"	30	"	"	Fred Volker	150.00
"	16	"	"	"	Geo. J. Fensky assign't	1000.00	Aug.	1	"	rent	Simms	35.00
"	"	"	"	"	(Est m)	1.50	"	1	"	"	Beachum	16.65
"	"	"	"	"	cash Schaeffer Abst.		"	2	"	cash	Tracy	30.00
"	"	"	"	"			"	5	"	Int. of Rost		129.75
"	"	"	"	"			"	6	"	Cash E. H. Stamm in		



"	7	"	J. Thomas Laundry	19.79	Sep	1	"	rent	Simms	46.00
"	16	"	recording Gutsch & Schaeffer Mtgs		"	7	"	"	Beachum	16.65
"	21	"	check	2.00	"	7	"	cash	Pruessner	25.00
"	28	"	Kimmerle laundry repairs	300.00	"	10	"	cash	Jos. Walker	30.00
"	28	"	ck Cent. Sash & Door Co.	4.20	"	15	"	"	Gutsch	15.00
"	28	"	cash for glass for store	4.45	"	15	"	"	Schaeffer	15.00
Oct.	27	"	door	.95	"	15	"	"	Frank Sawyer	10.00
"	31	"	Hulda Richter assignment		"	15	"	"	Fred Volker	15.00
			(Est m)	1001.00	"	16	"	"	Gibbons	12.50
Nov.	1	"	Com. pd C. F. Bridge	1.25	"	17	"	"	Casper Gettig	10.00
"	1	"	cash Kimmerle	.60	"	17	"	"	John Sell	12.00
					"	19	"	"	Andrew Meder	25.00
					"	19	"	"	Hamrick	10.00
					"	26	"	"	S. Rost	60.00
Oct.	3				"	3	"	rent	Simms	46.00
"	3				"	3	"	"	Beachum	16.65
"	8				"	8	"	"	C. B. Lane (Alley house)	2.50
"	11				"	11	"	cash	Reed Saylor	26.00
"	11				"	11	"	rebate on ins. on	Welke house	3.95
"	15				"	15	"	cash	Jos. E. Bausch for wind mill	10.00



"	15	"	Frank Gutsch	15.00
"	15	"	Louis Schaeffer	15.00
"	15	"	Frank Sawyer	10.00
"	17	"	Casper Gettig	10.00
"	17	"	M. G. Tracy	15.00
"	17	"	John Sell	10.00
"	17	"	M. S. Grant	16.00
"	17	"	Fred Volker	15.00
"	18	"	int Andrew Meder	12.00
"	18	"	H. S. Pruessner	25.00
"	19	"	Gibbons	12.50
"	29	"	Rost	30.00
"	31	"	Nov. Rent Jas. Corey	10.50
Nov. 1		"	" Beachum	16.65
" 1		"	" C. B. Lane	3.50
" 2		"	" Simms	46.00
" 5		"	cash (int) Sager	21.72

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 2529.37

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JEANETTE FENSKY

1904
1904

7429.92

To Am't brt frd

By amt brt frd

2529.37

Nov. 26	To cash p'd for barn	100.00	Nov. 11	By Ins. money for barn	100.00
Dec. 2	" " filing off Simms Mtg.	.25	" 15	" Cash Casper Gettig	10.00
" 12	" payment of 1904 taxes	158.68	" 15	" " Domme	30.00
" 15	" check	1000.00	" 15	" int of Van Laeyes	15.45
" 16	" "	1000.00	" 15	" cash Gutsch	15.00
" 17	" recording Geo. Fensky Mtg	1.00	" 15	" " Schaeffer	15.00
" 23	" ck Geo. Knoll for work	4.25	" 15	" " Havens	154.56
" 22	" com. p'd J. J. King for finding tenant	1.65	" 15	" " Frank Sawyer	10.00
" 24	" cash p'd Kimmerle repairs	2.50	" 15	" int of Fink	3.27
			" 16	" " Saylor	17.79
			" 16	" cash " Gibbon	12.50
			" 16	" " Volker	15.00
			" 17	" " Sell	12.00
			" 17	" " Hamrick	10.00
			" 19	" " John Deitz	20.00
			" 25	" " Rost	20.00
			" 25	" 6 mo. int Jos. Walker	22.50
			" 30	" ck of Pruesner	25.00
			Dec. 2	" rent Simms	46.00
			" 2	" " Beachum	16.65
			" 4	" " C. B. Lane	3.50
			" 13	" cash M. S. Grant	19.50
			" 15	" " Gutsch	15.00

"	15	"	"	Schaeffer	15.00
"	15	"	"	Frank Sawyer	5.00
"	16	"	"	Gibbons	12.50
"	16	"	"	Geo Fensky	1000.00
"	17	"	"	Geo. Brosamer	125.77
"	19	"	"	Völker	15.00
"	21	"	"	4 days Rent of Corey	2.00
"	22	"	"	rent pd J. W. Metler	4.50
					<hr/>
					4317.86

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## JEANETTE FENSKY

1905

		To amt brt frd	9698.25
Jan	1	To ck Krauss for Ida Wendt	
"	12	assignment (Est. m)	1002.00
"	31	ck Simms money	300.00
Feb	9	" Est. money	3000.00
"	9	" cash Jammer Abst	1.50
"	9	" " discharge Jammer	
"	9	Mtg	.25
"	9	" check	929.64
			<hr/>

		By amt brt frd	4317.86
Jan	1	By M. G. Tracey	10.00
"	4	" Jan rent Simms	21.00
"	4	" " J. W. Metter	16.85
"	4	" " Beachum	16.65
"	5	" " C. B. Lane	3.50
"	12	" cash Frank Simms	300.00
"	16	" " J. B. Gibbons	12.50
"	16	" " Louis Schaeffer	25.00
"	16	" " Frank Gutsch	15.00

"	17	"	"	Gettig	20.00
"	17	"	"	Volker	15.00
"	17	"	"	Sell	8.00
"	18	"	"	Tracey	10.00
"	20	"	"	Schaeffer	1.35
"	21	"	"	Jno. Brosamer	40.00
"	27	"	"	Hamrick	10.00
"	31	"	"	Sarah Rost	45.00
Feb	2	"	"	M. G. Tracy	16.35
"	6	"	"	Pruessner	25.00
"	7	"	"	C. B. Lane	3.50
"	7	"	"	Simms	21.00
"	9	"	"	Geo. Jammer	931.39
"	15	"	"	Domme	30.00
"	15	"	"	Louis Schaeffer	37.00
"	15	"	"	Frank Gutsch	25.33
"	15	"	"	Frank Sawyer	5.00
"	15	"	"	Casper Gettig	25.00
"	15	"	"	John Deitz	7.00
"	15	"	"	Fred Volker	15.00
"	16	"	"	Gibbons	12.00
"	16	"	"	Sells	10.00
"	16	"	"	Reed Saylor	15.00



"	18	"	"	M. S. Grant	12.00
"	20	"	"	Rost	25.00
"	20	"	"	John Brosamer	82.00
"	22	"	"	rent Eldridge	16.65
Mar	2	"	"	Mar rent Simms	21.00
"	2	"	"	1 yrs int of Tracy	18.00
"	6	"	"	int up to 1st Mar of Volker	34.45
"	6	"	"	rent R. M. Gamlowski	12.35
					<hr/>
					6287.73

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# JEANETTE FENSKY

1905

Mar.	15	To amt. brt. frd.	14931.64	Mar	By amt. brt. frd.	6287.73
"	15	To cash for plastering	6.00	Mar. 13	By rent of Lane for Mar.	3.50
"	15	" " ins. 515 Kans Ave.	8.80	" 14	" " Eldridge	16.65
"	15	Fredrick Fensky Ass't	1101.10	" 15	cash Gutsch	15.00
"	16	cash p'd Knoll repairs	15.00	" 15	" Shaeffer	15.00
Apr. 1	1	p'd Capital	3.00	" 17	" from Estate funds	11016.10
To balance			1410.09	" 18	" Gettig	10.00
				" 18	" Gibbons	13.00
				" 20	" M. S. Grant	14.00

12.00
15.00
20.00
16.65
21.00
<hr/>
17475.63

"	20	"	"	Jno. Sell
"	20	"	"	Volker
"	28	"	"	Hamerick
Apr.	4	"	rent	Gamlowski
"	5	"	"	Simms

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17475.63

1905

Apr. 22 To C. Jones for cleaning

Sewer

3.00

" 22 " Check

1500.00

To Balance

191.87

<hr/>
1694.87

1905

Apr.

" 12

By Balance

1410.09

" 15

By rent Eldridge

16.65

" 15

" cash Meder

103.00

" 15

" Schaeffer

25.00

" 15

" Gutsch

15.00

" 15

" F. Sawyer

5.00

" 15

" Fink

56.13

" 17

" Gettig

10.00

" 18

" Domme

30.00

" 19

" Gibbon

12.00

" 21

" M. S. Grant

12.00

<hr/>
1694.87

## JEANETTE FENSKY

1905	To ck Thomas Ins	3	5.31	By balance		191.87
May	" " M & Breeze for Ad.	4	3.00	" May rent Simms		24.50
"	" discharge Mitchell Mtg.	9	.75	" cash for little safe		6.00
"	" " Sheetz	9	.25	" rent Gamowski		16.65
"	" recording new Mitchell Mtg.	'	1.00	" cash Jno. Brosamer		13.80
"	" check	13	200.00	" int of Saylor		17.34
				May rent of Wilder		16.95
				" " M. G. Tracey		207.35
				" int. of Jos. Walker		22.50
				" cash of Gettig		10.00
				" " Sheetz in full		101.50
						<hr/> 628.16

## JEANETTE FENSKY

1905					
May 25	To amt. brt frd	210.31	By amt brt frd	628.16	
	" cash for paint and oil for		" cash Van Laeys	65.45	
	roof	4.00	" "	13.00	









"	16	"	rent of Gamlowski	16.00
"	16	"	cash Gibbons	12.50
"	16	"	" Jno. Brosamer	15.00
"	18	"	" Volker	15.00
"	18	"	" int. of Gutsch	13.00
"	18	"	int. of Schaeffer	8.90
"	19	"	" " Domme	15.00
"	23	"	" " Deitz	6.90
"	23	"	cash " Deitz	10.00
"	30	"	" " Gutsch	50.00
Sept	1	"	Geo. Hamrick	36.00
"	2	"	Sept rent Wm. Sherwood	16.65
"	2	"	" int. of Goff	22.50
"	3	"	cash Geo. Kimmerle	100.00
"	4	"	int of Jno. Brosamer	14.55
"	4	"	Sept rent of Simms	24.00
"	16	"	" " Gamlowski	16.65
"	18	"	cash Jno. Brosamer	12.00
"	18	"	" M. G. Tracy	30.85
"	19	"	" Volker	15.00
"	19	"	6 mo int. of Volker	27.00
"	19	"	cash Schaeffer	15.00
"	21	"	" Gibbons	12.50
"	23	"	int. of Goff	22.50

15.00

" 25 " cash of Gutsch

1396.82

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## JEANETTE FENSKY

1905

1905

Oct. 1	To amt. brt. frd.	871.85	By Amt. brt. frd.	1396.82
" 4	" cash for lumber for fence	17.79	" cash Gettig	20.00
" 19	" " hinges & nails at Sturgis	1.55	" " Pruessner	25.00
" 20	" Gettig Abst. of title	1.50	" int. Meder	18.00
" 20	" record of Gettig Mtg.	1.00	" cash Schaeffer	10.00
Nov. 2	" cash p'd Knoll for paper- ing	5.07	" Oct. rent of Gamlowski	16.65
" 2	" check (for Geo's money)	100.00	" cash Volker	15.00
" 8	" taxes of 1905 in full	321.31	" " Mrs. Grant	57.35
" 9	" check	467.75	" " Jno. Brosamer per Meyer	12.00
			" " Gutsch	15.00
			" " Gibbons	12.50
			" int. of Mitchell	47.50
			" cash Geo. Fensky	100.00
			" Nov. rent of Simms	24.00
			" Int. of Sager	18.00

2505.32

2505.32



1905						
Dec.	1	To discharge Tracy Mtg.	.25	Nov. 13	By int. of Saylor	17.34
"	8	" check	300.00	" 15	" 6 mos. int. Van Laeys	13.95
"	12	" bill for oil & lead (at Arnolds) for work at 515		" 15	" cash	50.00
"	12	" bill for glass at 515	3.15	" 15	" Tracey	35.00
"	19	" 1/2 Jos. Walker taxes	1.70	" 15	" Havens	87.54
"	25	" check Geo. Fensky	9.36	" 17	" Jno. Brosamer per Meyer	
"	27	" check	5.00	" 16	" Volker	12.00
			219.13	" 16	" Gamlowski	15.00
				" 22	" Gibbons	16.65
				" 22	" Gutsch	12.00
				" 27	" int. Jos. Walker	15.00
				Dec. 1	" cash Tracy in full	22.50
				" 6	" Dec. rent of Simms	12.70
				" 8	" taxes returned	24.00
				" 8	" cash Sell	11.61
				" 14	" goods of Pruessner	12.00
				" 15	" cash Volker	2.00
				" 15	" 6 mos. int. Havens	15.00
				" 16	" Dec. rent of Gamlowski	12.10
				" 16	" cash Geo. Brosamer	16.65
				" 18	" int. of Hamrick	95.55
						5.00



Feb.	1	To com. on Schaeffer Col.	4.25	Feb.	1	By cash of Schaeffer	85.00
"	2	" " Simms	1.20	"	2	" Feb. rent of Simms	24.00
"	6	" " Mitchell	15.00	"	6	" cash of Dr. Mitchell	300.00
"	7	" " Sinn	.65	"	7	" rent of Fred Sinn	12.90
"	9	" " Brosamer	30.45	"	9	" cash for Geo. Brosamer	
"	9	" check	863.55			Mtg.	609.00
"	10	" com. p'd C. D. Myes for finding tenant	.50	"	12	" " of Saylor	10.00
"	12	" com. on Saylor Col.	.50	"	15	" " Volker	15.00
"	15	" " Volker	.75	"	15	" int. of Fink	1.50
"	15	" " Fink	.07	"	16	" " Schaeffer	6.20
"	16	" " Schaeffer	.30	"	16	" Feb rent of Gamlowski	16.65
"	16	" cash p'd Capital	4.00	"	"	" cash for Mitchell note	1505.00
"	"	" com. on Mitchell Col.	75.25	"	17	" cash of Jno. Brosamer	12.00
"	17	" " Brosamer	.60	"	18	" " Domme	15.00
"	18	" " Domme	.75	"	21	" int. of Gutsch	8.50
"	20	" check (no letter)	1000.00	"	21	" cash of Gibbons	13.00
"	21	" com. on Gutsch Col.	.43	"	21	" rent of Zinn	1.00
"	21	" " Gibbons	.65				
"	24	" " Zinn	.05				
"	26	" check	635.80				
			<hr/>				<hr/>
			2634.75				2634.75

1906	2	To com. on Simms Col.	1.20	2	By Mar. rent of Simms	24.00
Mar.	3	" cash p'd on J. N. Henry		" 6	" cash from sale of gutsch	
"	6	" for repairs on pump	4.50	" 6	& Schaeffer Mtgs	450.00
"	6	" cash completing Abst.	1.50	" 6	By int. of Dr. Mitchell	46.00
"	6	" com. on sales of Mtgs	22.50	" 12	" cash of Saylor	10.00
"	6	" " Mitchell Col.	2.30			
"	8	" Geo. Corey for plastering	6.00			
"	12	" check	400.00			
"	12	" com. on Saylor Col.	.50			
"	12	" cash p'd Strugis	.85			
"	15	" " J. Thomas lumber				
		Co.	3.10			

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 530.00

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## JEANETTE FENSKY

<u>1906</u>				<u>1906</u>	
Mar. 17	To amt. brt. frd.	442.45	Mar. 17	By amt. brt. frd.	530.00
" 17	To com. on Meder Col.	10.00	" 17	" cash of Meder	200.00
" 17	" " Volker	.75	" 17	" " Volker	15.00
" 17	" " Brosamer Col.	.60	" 17	" " Jno. Brosamer	12.00
" 17	" cash p'd Regr' of deeds		" 22	" " Meder	5.00



	discharge of Meder Mtg.	.25				
" 19	check	200.00	" 22	"	" Gibbons	11.50
" 22	com. on Meder Col.	.25	" 23	"	" Sheetz for Meder Mtg.	101.00
" 22	" " Gibbons "	.55	" 24	"	" Gutsch	15.00
" 23	check	100.00				
" 24	com. on Gutsch	.75				
" 31	check	128.85				
		<hr/>				<hr/>
		889.50				889.50

Apr. 3	To Com. on Simms Col.	1.20	Apr. 3	By Apr. rent of Simms	24.00
" 5	" " Brosamer Mtg.	17.50	" 5	" cash of Mattie Sheetz for Jno. Brosamer Mtg.	350.00
" 12	" " Saylor Col.	.50	" 12	" cash of Saylor	10.00
" 14	" " Rost	17.19	" 14	" " Sarah Rost	343.85
" 14	fee in Allison case	50.00	" 16	" " Volker	15.00
" 14	check	500.00	" 17	" " Jno. Brosamer	11.50
" 16	com. on Volker Col.	.75	" 18	" int. of Gettig up to 16 inst.	11.10
" 17	" " Brosamer "	.57	" 18	" cash of Gettig on prin.	3.90
" 18	" " Gettig "	.75	" 19	" " Mrs. Gibbons	13.50
" 18	cash returned to Sheetz on Schaeffer note	30.00	" 20	" " Sell	80.00
" 19	Com. on Gibbons Col.	.67	" 21	" int. of Volker	23.00
" 20	" " Sell	4.00			



674.71

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## JEANETTE FENSKY

1906

1906

	To Amt Brt Frd	34.25	By Amt brt frd	674.71
May 23	" cash for Rost Abst Title	2.00	" cash of Gibbons	12.50
" 25	" com. on Gibbons Col.	.63	" " for Sager Mtg of	
" 26	" Foucht bill for work &		Ringer	480.00
	material at home place	8.13		
" 28	" recording Volker Mtg.	1.00		
" "	" com. on Sager-Ringer Col.	24.00		
June 1	" check	500.00		
" 1	" recording Gibbons Mtg.	1.00		
" 2	" check	596.20		
		<u>1167.21</u>		<u>1167.21</u>

June	To lumber bill for front fence	1.05	By June rent of Simms	24.00
"	" paint bill for front fence	1.50	" cash of Saylor	10.00
"	" window glass bill	.45	" interest of Goff	45.00
" 5	" cash for Gibbons Abst.	2.50	" One yrs int. of Sell	44.00

"	8	"	papering at old home	6.63	"	16	"	Bal on 2d note of Sell	5.00
"	9	"	Com. on Simms Col.	1.20	"	21	"	Mattresses of Pruessner	8.80
"	9	"	screen for door	.35	"	26	"	cash Jos. Walker	754.75
"	13	"	com. on Saylor Col.	.50	"	26	"	" of Walker	
"	14	"	" " Goff	2.25	"	29	"	(tax money)	9.36
"	16	"	" " Sell	2.45	"	29	"	for Gibbons Mtg.	645.00
"	19	"	cash p'd Jos. Walker June tax.		"	29	"	" Volker	710.00
"	20	"	recording power of Atty	9.36	"	29	"	" Sell	585.00
"	21	"	com. on Pruessner Col.	1.00					
"	26	"	" " Walker	.44					
"	26	"	check	37.75					
"	29	"	Notary fees on Mtg sales	754.75					
"	29	"	com. on Gibbons Col.	.75					
"	29	"	" " Volker	32.25					
"	29	"	" " Sell	35.50					
"	29	"	" " "	29.25					
July	2	"	check	1920.98					
				<hr/>					
				2840.91					<hr/>
July	5	To com. on	Co-warrant	1.25	July	5	By	County warrant	25.00
"	14	" " "	Saylor Col.	.50	"	14	"	cash of Saylor	10.00
"	20	" " "	sale of Saylor note		"	20	"	" for Saylor	



" 20	" check	24.25	" 24	note & Mtg.	480.50
" 24	" com. on Gettig Col.	456.25	" 25	" cash of Gettig	40.00
" 25	" " Saylor "	2.00	" 30	" " Saylor	35.00
" 30	" " sale of Mtges	1.75		" " Van Laeys	
" 30	" check	34.28		& Gettig Mtg.	685.70
Aug. 1	" check to Bradley for re-	651.42	Aug 4	" One yrs int. of	
	pairing roof			Hamrick	20.52
" 4	" Comm. on Hamrick Col.	6.00	" 7	" cash of Mrs. Grant	8.00
" 7	" " Grant	1.02			
		.40			
		<hr/>			<hr/>
		1179.12			1304.72

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## JEANETTE FENSKY

1906

1906

Aug. 8	To amt. Brt. Frd	1179.12	Aug. 8	By amt. brt. frd.	1304.72
" 10	To com. on Sims Col.	1.20	" 14	By Aug. rent of Sims	24.00
	" check to council porch			" int. of Deitz	7.00
	repairs	12.70			
" 13	" cash returned to Cit. St.				
	Bk.	3.90			



" 7	" " " Rost	6.00	" 7	& cash.	17.70
" 15	" " " Domme	1.00	" " " (int) of Rost	cash of Mrs. Grant	15.00
Dec. 8	" " " Simms	1.00	" 7	" " " of Jno. Domme	120.00
" 12	" " " Grant	14.25	" 15	" rent of Simms	20.00
" 13	" taxes for 1906	74.66	Dec. 8	" cash " Mrs. Grant	20.00
" 15	" check	393.41	" 12		285.00
		<hr/> 492.70 <hr/>			<hr/> 492.70 <hr/>
Dec. 19	To Com. on Kimmerle Col.	1.50	Dec. 19	By cash of Kimmerle	30.00
" 24	" cash returned to Grant	25.00	1907		
1907					
Jan.	To com. on Simms Col.	1.00	Jan	" Jan. rent of Simms	20.00
Feb.	" " " "	1.00	Feb.	" Feb. " " "	20.00
" 12	" check to Bridge	41.50			
		<hr/> 70.00 <hr/>			<hr/> 70.00 <hr/>
Feb. 18	To cash for Abst.	9.00	Feb. 22	By cash of Domme	10.00
" 22	" com. on Domme Col.	.50	Mar. 1	" rent of Simms	20.00
Mar. 1	" " " Simms	1.00			
" 7	" check to Bridge	9.92	"	balance	.42





June 1	" note due in 3 yrs	1000.00	
" 15	" check	256.33	
" 14	" com. on Hemmrick Col.	19.00	
		<hr/>	
		1600.70	
Jun 29	To com. on Fink Col.	20	June 29 By cash of Fink in full
July 2	" " Pruessner Col.	2.50	July 2 " " Pruessner
" 3	" " Goff	1.15	" 3 " " Goff
" 9	" " "	1.15	" 9 " " "
" 5	" " Deitz	11.00	" 5 " " Deitz in full
" 13	" check (no letter)	250.00	Aug. 17 " " Goff
Aug. 17	" com. on Goff Col.	1.15	" 19 " " Mollie Grant
" 19	" " Grant	.15	" 24 " check of Pruessner
" 24	" " Pruessner	1.10	Oct. 7 " cash of Goff
Sept 6	" drawing Pruessner Mtg	5.00	" 15 " " Dyson per
" 18	" recording Pruessner Mtg	1.25	Chapman 355.00
Oct. 7	" com. on Goff Col.	1.15	" " " Mrs. Grant
" 15	" " Dyson	17.75	
" 15	" check	355.00	
" 19	" com. on Grant Col.	.60	
Dec. 28	" check	105.53	
		<hr/>	
		754.68	<hr/>
			754.68

<u>1908</u>				<u>1908</u>			
Apr. 15	To com. on Dyson Col.	17.50	Apr. 15	By cash of Dyson	347.50		
" 16	" check	330.00	June 1	" one yrs int.	60.00		
May 6	" check for my int.	60.00	May 19	" cash for Rost Mtg.	2965.00		
" 19	" fee in mortgage sale	265.00	July 6	" int. of Goff	22.50		
" 26	" check	2700.00	" 9	Mrs. Fensky died at Pasadena			

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### JEANETTE FENSKY ESTATE

<u>1908</u>			<u>1908</u>				
Oct. 18	To appraisers fees	6.00	Aug. 7	By int. of Goff	22.50		
Dec. 2	" probate	12.45	" 17	" Cash of M. S. Grant	5.00		
<u>1909</u>			Sept. 3	" " "	5.00		
July 6	" " "	1.30	" 5	" int. of Goff	22.50		
" 6	" cash p'd to legacies	779.90	" 16	" cash of Grant	7.00		
Sept. 8	" " "	242.00	" 23	" " "	10.00		
" 8	" taxes of 1909	58.56	Oct. 6	" int. of Goff	22.50		
Dec. 6	" compensation to date	149.09	Dec. 4	" cash of Grant	10.00		
			<u>1909</u>				
			Jan. 15	" " "	10.80		
			" 27	" " "	8.00		
			Feb. 18	" " " in full	13.00		
			May 29	" " Pruessner	7.80		







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## JEANETTE FENSKY ESTATE

1912						
<u>Dec.</u>	16	To taxes of 1912	9.52	<u>July</u> 30	By interest of Hastings	22.50
				Nov. 6	" "	22.50
1913				" 27	" "	45.00
<u>Mar.</u>		To completing Abst of title	10.00	Mar.	" cash of Hampe	1800.00
May 13		" taxes	29.31			
" 13		" costs in full	11.95			
		" fee	125.80			
		To balance	1703.42			
			<u>1890.00</u>			<u>1890.00</u>
Nov. 20		To cks to legaties up to this date	1471.17		By balance	1703.42
1914					By surplus	.04
<u>Mar.</u>	31	To ck to Mrs. Addie Colton	77.43			
Aug. 19		" " " Laura Coughlin	77.43			
Dec. 21		" " " Bain Fensky	77.43			
			<u>1703.46</u>			<u>1703.46</u>

It was further stipulated, admitted and agreed that prior to April 6, 1903, Ferdinand Fensky and wife executed contracts in writing for the sale of about 29 tracts or lots of land which Ferdinand Fensky owned in his own right, lying and being in the City of Topeka, Shawnee County, Kansas, mainly consisting of lots in Fensky's First and Second Additions to Topeka and 12 acres in Reserve 5, lot 61, on Kansas Avenue, South, and a part of Lot 71, in said City of Topeka. It was further stipulated, admitted and agreed that the following is a list of such contracts, the same being for lots in Fensky's Addition with the exception of the last three, and such list giving the full amount named in the contract to be paid for the lots to be conveyed, the date when the contract was executed, and the balance due on the price at the time of the death of Ferdinand Fensky, as the same is shown by the endorsements on the back of each contract, to-wit:

Vendee	Amt. of Contract	Date	Bal. Due.
Dustin	\$ 550.00	July 15, 1899	\$ 217.95
Hamerick	800.00	May, 28, 1900	427.18
Sawyer	430.00	June, 15, 1900	329.34
Kafton	853.60	Aug. 15, 1901	690.00
Meder	540.00	Aug. 15, 1901	286.90
Saylor	950.00	May, 15, 1901	683.01
J. Brosamer	1065.00	Mar. 15, 1900	743.95
Sell	968.55	May, 15, 1903	947.55
Grant	540.00	Dec., 15, 1900	508.57
Deitz	500.00	July 10, 1900	300.64
Jammer	1150.00	Feb. 15, 1900	845.05
Tracy	840.00	Sept. 15, 1899	451.10
G. Brosamer	1585.00	May 27, 1901	794.74
Lippert	660.00	Nov. 15, 1900	199.10
Sawyer	800.00	Aug. 15, 1901	685.43
Van Laeys	800.00	Aug. 15, 1901	537.64

Fink	267.00	Sept. 1, 1900	108.68
Walker	1209.45	Nov. 15, 1901	914.45
Etzel	704.00	Nov. 15, 1900	571.24
Gibbons	964.03	Nov. 15, 1901	849.03
Stamn	200.00	Sept. 14, 1901	112.30
Gutch	940.00	May, 15, 1901	596.22
Havens	971.45	Sept. 15, 1901	720.20
Schaeffer	915.00	May 15, 1900	584.33
Baxter	1160.00	Aug. 1, 1901	1022.24
Domme	940.00	May, 23, 1901	663.91
Goff	1800.00	Aug. 22, 1901	1740.00
Rost	4600.00	Feb. 1, 1903	4510.00
Pruessner	2200.00	June 1902	1925.00

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\$22965.75

It was further stipulated, admitted and agreed that the following is a full, true and correct copy of one of such contracts executed by Fensky and wife to John H. Sell, and that the remaining twenty-eight contracts were identical in form to this said contract except as to dates, description of property, name of vendee, amount of purchase price and terms of payment:

THIS AGREEMENT, Made this 15th day of May, 1903, by and between F Fensky of the first part, of Los Angeles county, in the State of California, and John H. Sell of the second part, of Shawnee county, in the State of Kansas.

Witnesseth, That said party of the first part, for the consideration hereinafter mentioned, covenants and agrees to SELL AND CONVEY unto said party of the second part, his heirs and assigns, all the following-described real estate situate in the county of Shawnee and State of Kansas, to wit:

Lots numbered Forty Eight 48 and Fifty (50) on Lake Street north all in Fenskys 2nd Addition to the City of Topeka.

In Consideration of Which, Said party of the second part covenants and agrees to pay unto the said party of the first part, for the same, the sum of Nine Hundred and Sixty Eight 55/100 Dollars, \$968.55/100 as follows: Twelve Dollars on the 15th day of June 1903 and Twelve Dollars or more on the 15th day of each and every month thereafter with Six per cent interest payable semiannually until the whole amount is paid, and on any sums so paid said interest shall cease, all sums payable at Citizens State Bank North Topeka Ks: or otherwise designated, and it is further agreed that said 2nd party shall keep the building insured for at least the sum of \$1000.00 for the benefit of the 1st party as his interest may appear. The semi annual interest may be deducted from the monthly payments made and the balance be credited on the principal

And the said party of the first part, on receiving said sum and sums of money, at the time and in the manner aforementioned, shall at his own expense execute and deliver to said party of the second part, a good and sufficient WARRANTY DEED, conveying and assuring unto said party of the second part, an indefeasible estate of inheritance, in fee simple, of and in all and singular the above-described premises, with the appurtenances, and warrant that the same are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judg-



ments, taxes, assessments and incumbrances, of whatever nature or kind soever.

It is further agree between the parties to these presents, ~~the the part~~ of the first part ~~to retain possession of said premises until the~~ day of , 190 , when the same shall be delivered up to said part of the second part, upon compliance with the agreements herein before contained; that said party of the second part shall pay all taxes or assessments becoming chargeable to or upon said premises after this date ~~delivery of possession thereof as aforesaid~~; and that if default be made in fulfilling this agreement, or any part thereof, by or on behalf of said party of the second part, this agreement shall, at the option of said party of the first part, be forfeited and determined, and said party of the second part shall forfeit all payments made by him on the same, and such payments shall be retained by said party of the first part in full satisfaction, and in liquidation of all damages by him sustained, and he shall have the right to re-enter and take possession of said premises.

And it is further mutually agreed that all covenants and agreements herein contained shall extend to and bind the respective heirs, executors, administrators and assigns of said parties.

IN WITNESS WHEREOF, The said parties have hereunto set their hands, the day and year first above written.

(Testimony of Lucius A. Parmele.)

Executed in the presence of

F Fensky

John H Sell

\_\_\_\_\_)  
\_\_\_\_\_)  
\_\_\_\_\_)  
\_\_\_\_\_)

I hereby consent to  
the within Agreement  
Jeanette Fensky.

Witnesses.

LUCIUS A. PARMELE,

a witness called on behalf of the plaintiffs, testified as follows:

#### DIRECT EXAMINATION

In September 1907, I was in the real estate business in Pasadena with Don Ferguson. At that time I was a notary public. On September 18, 1907, I prepared certain deeds and other documents signed by Mrs. Jeanette Fensky. Mr. Ferguson in the morning gave me a list of properties owned by Mrs. Fensky and the names of the parties to whom she wished them deeded. I drew the deeds and went to Mrs. Fensky's house with Mr. Ferguson, and they were signed there on September 18, 1907. I saw Mrs. Fensky at that time. She was in bed in a room up stairs. Besides myself, Mr. Ferguson and Mrs. Fensky, there were present Mrs. Schmidt, Mrs. Katzung and Mrs. Farnsworth. The latter three did not remain in the room all of the time I was there. I showed Mrs. Fensky each paper and told her the nature of the paper and to whom it was granted -- the grantees. She signed them and acknowledged them. After she had signed the deeds,

(Testimony of Lucius A. Parmele.)

the question came up in regard to mortgages. She asked every one except Mr. Ferguson and myself to leave the room. They all left at her request. After they left the room she told me to which one she wanted the mortgages assigned. She directed Mr. Ferguson to take the papers and keep them -- to continue to have control and charge of the property and at the time of her death to record the papers covering such properties as she might have at the time of her death. She directed him to sell the property, or handle it just as if the deeds had not been given; that any property she owned at the time of her death covered by the deeds, those deeds were to be recorded. I took the deeds back to the office, completed the acknowledgments and gave them to Mr. Ferguson. Prior to Mrs. Fensky's death, one deed was given on a piece of property which had been sold on a contract prior to September. This was Lot 5 of the Lewis tract, transferred to Chenoweth. The deed which you now show me which is from the files of the case of Farnsworth against Ferguson, in the Superior Court of this county, is one of the deeds which she signed and acknowledged before me September 18, 1907.

The deed was offered and received in evidence as plaintiffs' Exhibit 11. The deed is signed and acknowledged by Jeanette Fensky, dated and acknowledged September 18, 1907, and grants to Alma J. Schmidt Lot 5 of the Lewis tract.

(Witness continuing): After she signed the deeds she also assigned some mortgages. I took the ac-

(Testimony of Lucius A. Parmele.)

knowledgments of the assignments. The assignments were placed with the deeds. The mortgage from Halbriter to Fensky I thought was paid prior to her death. On January 22, 1908, I took Mrs. Fensky's acknowledgment of the satisfaction of that mortgage. The two mortgages which she assigned September 18, 1907, were as follows, as shown by my notarial record:

"Mortgage assignment. Jeanette Fensky to Amanda Katzung and Alma J. Schmidt. Assignment of mortgage given by Frank E. Webster and Clara M. Webster to Jeanette Fensky, dated April 22, 1907, dated September 18, 1907."

"Mortgage assignment. Jeanette Fensky to Eugene Wellke. Assignment of mortgage given January 17, 1906, by Ed. and Hattie Halbriter to Jeanette Fensky, recorded February 8, 1906, in book 1138 Mortgages page 181, Los Angeles County Records, dated September 18, 1907."

(Witness continuing): September 18 is the date of the assignments. On the date mentioned I also prepared a deed for property outside of Los Angeles County which was signed by Mrs. Fensky. This deed conveyed to Alma J. Schmidt the east half of farm lot 181, maps of subdivision of land belonging to Semi-Tropic Land and Water Company, San Bernardino County.

#### CROSS EXAMINATION

I had known Mrs. Fensky a year or two prior to visiting her home, September 18, 1907. Had done



(Testimony of Lucius A. Parmele.)

business for her in connection with acknowledgments to instruments. I couldn't tell how many different occasions, but as many as half a dozen times, at least. Mr. Ferguson had been carrying on business for Mrs. Fensky prior to September 18, 1907, practically all the time I was with him. I went with him in the latter part of 1905. The business which Mr. Ferguson transacted for Mrs. Fensky during the period referred to, was selling, buying, and taking care of her property. I took thirteen deeds to Mrs. Fensky's house on the eighteenth of September. I went there in company with Mr. Ferguson. Mrs. Katzung, Mrs. Schmidt and Mrs. Farnsworth were in the room. She signed the deeds prior to the time those ladies were excused from the room. When she signed the deeds I sat down by the side of the bed. I showed her the deeds and told her what they were, and explained the papers to her and she signed them. I told her what the properties were, and who were the grantees -- took the deeds up, one by one. She said they were all right -- made no other remark that I remember. I showed them to her and she signed them as we went along. Showed her a deed and she executed it. She did not make any other comment that I recall, other than that it was all right. During the time that she signed up the entire thirteen deeds, she made that comment upon each occasion, when I would show her a deed. The assignments of mortgages were signed and executed after the deeds were signed, if I remember correctly. I handled the assignments just the same as I did with the deeds,

(Testimony of Lucius A. Parmele.)

explained the instruments to her. She made no comments as I remember of, except that she approved them and said they were all right -- did not say anything else that I recall. Mr. Ferguson was sitting there. I don't remember -- whether he participated in any way in these negotiations when I was reading her these documents or she was signing them. He may have spoken, I don't remember. I don't recall of his having done so. The ladies in the room did not interfere or in anywise participate in the transaction that I recall. As soon as the different deeds and mortgages were signed, she told me too -- I don't remember whether the first statement or not, but she told me to deliver the deeds to Mr. Ferguson and that Mr. Ferguson take them and keep them. He was there, in the room. I don't know whether he was at the bedside, or not. She first told me to deliver the deeds to Mr. Ferguson. I had them in my hand. I don't know as she spoke directly to me or to Mr. Ferguson or who, but she told Mr. Ferguson to take them, or said for Mr. Ferguson to take them to the bank and keep them. That was after she told me to deliver the deeds to Mr. Ferguson. I took them back to the office with me and completed the acknowledgments and delivered them to Mr. Ferguson.

Q. Did she tell you to deliver the deeds to Mr. Ferguson before she said anything to Mr. Ferguson on this occasion?

A No, I don't know about that -- the conversation. I  
(Question read.)

(Testimony of Lucius A. Parmele.)

A It was all done at that time, and I can't tell just which statement came first, my recollection now.

Q Well, let us get at it in another way: As she signed the various deeds, what did you do with them, physically? Did you take them back into your hand and put them into your pocket?

A No; they were just lying on the --

Q On the bed?

A Lying there until they were all signed.

Q Now, what did you do with them, if anything?

A I picked them up and took them away with me and completed the acknowledgments.

Q Now, do you recall the first thing that Mrs. Fensky said after she had completed signing these various documents?

A No, I don't know as I could say as to that.

Q Do you know whether she first spoke to you with relation to what should be done with them, or did she first speak to Mr. Ferguson?

A Well, I couldn't say as to that. It was all right there at that time, and I don't recall just how it was.

Q Now, state as nearly as you can her exact language, because it is quite important that we have her exact words, if it is possible for you to give them.

A Well, it would be impossible for me to give them in exact words.

Q Well, give her exact words just as near as you can approximately. I know you want to be fair. Just as near as you can, what she said.

(Testimony of Lucius A. Parmele.)

A Well, I could give them in substance, and that is all I could do. She directed Mr. Ferguson to keep the deeds in escrow, and to record any covering the property which she might own at the time of her death.

Q Did she use those words, "record any covering property she might own at her death?"

A That is my recollection of it, of the substance of it, at least; or to sell or dispose and manage the property.

Q See if you can't give the exact language that she employed.

A I couldn't attempt to give it any more definitely than that.

Q Do you remember about how long it took her to give these instructions to Mr. Ferguson -- how many minutes?

A No.

Q Did she say anything to him as to how he might dispose of any of the property prior to her death?

A Not further than to handle it the same as it was her property, the way he had been handling, selling, buying and trading property.

Q Did she use those words, that he could sell, buy and trade the property?

A Yes.

Q Now isn't this what she said: She gave the deeds to Mr. Ferguson and said this: "Take these deeds and keep them until my death, and after my death record them; but if in the meantime you get a chance to sell



(Testimony of Lucius A. Parmele.)

any of this property at a profit, do so, and I will make it right with the grantees."

A I wouldn't say that.

Q You will not say that that is not what she said, will you?

A No, I would not say it. It is so long ago I have forgotten just what the conversation was. I have forgotten the exact wording.

Q Now, the ladies were excused from the room during this interval of time -- the other ladies that were in the room at the time she held the conversation with Mr. Ferguson with respect to the deeds?

A No, with respect to the assignments of the mortgages.

Q Oh, they were in the room at the time she gave the directions to Mr. Ferguson with respect to the deeds?

A I think they came back into the room after she talked about the assignments of the mortgages.

Q And that was prior to her giving Mr. Ferguson instructions with regard to what should be done with the deeds?

A Yes, sir.

Q Did you go out of the room at the time the ladies were excused from the room?

A No, sir.

Q Were you in the room the entire time?

A Yes, sir.

Q And Mr. Ferguson was?

A Yes, sir.

(Testimony of Lucius A. Parmele.)

Q Now, who took the deeds and assignments of mortgages out of the room, you or Mr. Ferguson?

A I did.

Q You took them to the bank and completed the acknowledgments?

A Took them to the office.

Q To the office, and then turned the deeds and assignments over to Mr. Ferguson?

A Yes, sir.

Q That is the last you saw of them?

A The last at that time.

\* \* \* \* \*

Q Upon the occasion of September 18th, when you were at Mrs. Fensky's, did Mrs. Fensky say anything to you or in your hearing about her desire of disposing of all of her property at that time?

A Not except in the way that I have stated.

Q Was anything said about a will on this occasion?

A I don't recall whether there was, or not, on that occasion.

Q Wasn't the will disposing of the Kansas property by Mrs. Fensky discussed by her at that time?

A It may have been; I don't know.

Q There may have been statements made by Mrs. Fensky with respect to these deeds or property at that time that you do not now recall?

A Perhaps.

Q As I understand your testimony now, at any rate, you do not recall anything being said about a will at that time?

(Testimony of Lucius A. Parmele.)

A I don't recall now whether there was anything said about a will, or not.

Q And as you recall, there was no will drawn up in your presence at that time?

A No; there was none drawn in my presence.

Q Now, I show you a document which purports to be a last will and testament, executed by Jeanette Fensky, on September 18th, 1907, and ask you if you didn't sign that as a witness (showing)?

A Yes; that is my signature.

Q Where were you when you signed that will?

A Well, that was signed at the same time the deeds and assignments were signed, and executed. I had forgotten that.

Q There was a will executed then on this occasion?

A Yes, sir.

Q Now, with your memory refreshed in that regard, perhaps you can tell me something else that was said by Mrs. Fensky at that time. What was said respecting the will for instance? Can you recall?

A I don't recall anything else. There may have been something else said.

Q Do you remember whether the will was executed prior or subsequent to the execution of the deeds?

A I do not.

Q Is the body of that will made out in your handwriting?

A It is.

Q It is?

A Yes, sir.

(Testimony of Lucius A. Parmele.)

Q Did you draw it up while you were sitting there by her bed on this occasion?

A I think I did.

Q Had you been advised prior to coming there on that occasion that she desired to make a will?

A There must have been something said about it, or I would not have had the blank form with me.

Q You brought the form with you, did you?

A I undoubtedly did.

Q Well, do you recognize it?

A It is just a regular form.

Q Did you have any conversation with Mrs. Fensky regarding the contents of the will before you drafted it?

A I drafted it at her dictation as to what to do.

Q Surely. Now, do you remember what she said to you about what she wanted in the will before you took up the matter of execution of the deeds, or was it after that?

A I couldn't say.

Q Did she converse with you with respect to the will while these ladies were in the room, or were they out of the room?

A I couldn't answer that either way.

Q Do you remember where you sat in the room when you drew up this will?

A By the side of the bed.

Q The will, as you recall, disposes only of her property in Kansas? (Handing will to the witness).

A Yes, sir.



(Testimony of Lucius A. Parmele.)

Q Now, does that fact refresh your recollection as to whether or not at this time Mrs. Fensky told you that she was going to dispose of her Kansas property by a will, but was intending to dispose of all of her other property by making these deeds and conveyances that you drew up on this occasion?

A No.

Q Did she give you any reason for making a will only with respect to her Kansas property?

A No, not that I remember.

Q Isn't it a fact that on this occasion she told you that she wanted all of her people to have a home upon her death, and for that reason she was dividing the Kansas property by a will among the Kansas relatives and was dividing the California and her other property among her own relatives by making deeds and assignments?

\* \* \*

A I don't remember any such statement.

Q BY MR. EDWARDS: By whom did you receive instructions relative to the drafting of these various deeds and assignments prior to going to Mrs. Fensky's house?

A Mr. Ferguson.

Q That was your employer?

A Yes, sir.

Q And how long was it before the 18th of September, 1907, that you received such instructions?

A On the morning of the 18th. It was all on that same day.

(Testimony of Lucius A. Parmele.)

Q He had not spoken to you about the matter previously?

A Nothing definite, at least. Whether it was mentioned before, or not, I can't recall.

Q Did he give you the names of the grantees and of the various pieces of property?

A Yes, sir.

LOUIS HANSEN,

a witness called on behalf of the plaintiffs, testified as follows:

I have resided in San Pedro for seventeen years. I have been a real estate appraiser for fifteen years. I was familiar with real estate valuations in and about San Pedro in 1903.

Q Do you know the value of the property in the summer and fall of 1903?

MR. POORMAN: Objected to as incompetent, irrelevant and immaterial. It is alleged here that the property was undervalued, but there is no allegation \* \* \* connecting any of the defendants in this action with any undervaluation of the property, and the appraisal having been made in the Estate of Ferdinand Fensky, and that having gone to a decree of distribution, it is not competent at this time to question those appraisals in this action.

\* \* \*

MR. EDWARDS: Wouldn't they have to show a fraud, first -- that there was a collusion or fraud between Jeanette Fensky or her attorneys and the ap-

(Testimony of Louis Hansen.)

appraisers, to procure a false appraisement? An appraiser might underestimate property. That is very frequently done, and sometimes it is overestimated; but they will have to make a showing that there was a fraudulent undervaluation. We contend that it is inadmissible to show that perhaps the property had a different value than that given by the appraisers appointed by the Court, and against which there is no charge of fraud.

\* \* \*

THE COURT: Objection overruled.

In October, 1903, lots 9 and 10 in Peck's Subdivision of Block 74 of San Pedro were worth about \$10,000. There was a house on lot 10. Lots 19 to 29 inclusive in Block "C" of Peck's Subdivision of the Carolina tract in October, 1903, were worth about \$4,000.00.

#### CROSS EXAMINATION.

Judge Goodrich paid the same time as Mr. Fensky bought 9 and 10 -- I think he paid \$1200 for his lot. That is early in 1903, and built on it. That was joining property. The next lot was the two, 9 and 10. Very late in 1903, or maybe the beginning of 1904, I am not positive of dates, Lot 8 sold for \$6000., then the corner sold for \$12500. The other tract lots 19 to 29, Block C, is on 24th Street. It was subdivided but there were no houses on any of the lots. The property was bought at auction the first week in March, 1903. This property is over half a mile from the main part of town where the Pacific Electric cars run and the banks are. Twenty-fourth Street was opened in

(Testimony of Louis Hansen.)

1903. It was ploughed and curbed. There was a cemetery right across the street from the Fensky property in 1903, and it is there yet. The boom began in June and July, 1903, and went all that year and went into 1904. The boom broke in the latter part of 1904. It lasted about a year. The proportional increase of values of property in the Carolina Tract, after the boom hit the tract, was about fifty per cent.

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Thereupon the inventory and appraisement of the estate of Ferdinand Fensky in the Superior Court of Los Angeles County No. 6647 was offered and received in evidence as Plaintiffs' Exhibit 18. The same is as follows:

IN THE SUPERIOR COURT OF THE STATE  
OF CALIFORNIA,  
IN AND FOR THE COUNTY OF LOS ANGELES.

IN THE MATTER OF  
THE ESTATE OF       )  
  : INVENTORY AND  
FERDINAND FENSKY, ) APPRAISEMENT.  
Deceased.       :

I, C. G. KEYES, County Clerk of the County of Los Angeles, and ex-officio Clerk of the Superior Court thereof, do hereby certify that Adolph Muller, S. A. Cline, and W. H. Munroe, three duly qualified and disinterested persons, were duly appointed appraisers of the estate of said deceased, by order of the said Superior Court, duly entered.



Witness my hand and the Seal of said Superior Court this 19<sup>th</sup> day of Oct. 1903.

C. G. KEYES, Clerk.

By W. C. Warren, Deputy.

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STATE OF CALIFORNIA, )  
County of Los Angeles. ) ss.

Adolph Muller, S. A. Cline and W. H. Munroe, duly appointed appraisers of the estate of Ferdinand Fensky, deceased, being duly sworn, each for himself says that he will truly, honestly and impartially appraise the property of said estate which shall be exhibited to him, according to the best of his knowledge and ability.

Adolph Muller

SUBSCRIBED and sworn to before me, this 24th day of October 1903. John V. B. Goodrich, Notary Public in and for the County of Los Angeles, State of California.

S. A. Cline

W. H. Munroe.

(110 Clerk - Probate)

STATE OF CALIFORNIA, )  
County of Los Angeles. ) ss.

Jeanette Fensky, the Administratrix of the estate of Ferdinand Fensky, deceased, being duly sworn, says that the annexed inventory contains a true statement

estate

of all the assets of the said deceased, which has come to the knowledge and possession of said Administratrix, and particularly of all the money belonging to the

said deceased, and of all just claims of the said deceased against the said Administratrix.

Jeanette Fensky.

SUBSCRIBED and sworn to before me this 24th day of October, 1903.

John V. B. Goodrich,  
Notary Public in and for the County  
of Los Angeles, State of California.

ESTATE OF Ferdinand Fensky, Deceased:

To Adolph Muller, S. A. Cline, and W. H. Munroe, Appraisers, Dr. To compensation for services in appraising said estate—items as follows: One days' service at \$3.00 per day, each \$9.00. Necessary disbursements as follows: Nothing.

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STATE OF CALIFORNIA, )  
County of Los Angeles. ) ss.

Adolph Muller, S. A. Cline and W. H. Munroe, the appraisers above named, being duly sworn, each for himself says that the foregoing bill of items is correct and just, and that the services have been duly rendered as therein set forth.

Adolph Muller

SUBSCRIBED and sworn to before ) S. A. Cline  
me, this 24th day of October, 1903. ) W. H. Munroe  
John V. B. Goodrich, Notary Public  
in and for the County of Los Angeles,  
State of California.

Moneys belonging to said deceased, which have come  
to the hands of the Administratrix, \$ 0.00

That certain piece or parcel of land, situate, lying and being in the City of Los Angeles, County of Los Angeles, State of California, and bounded and described as follows; to-wit:

Commencing at a point in the westerly line of New High Street distant two hundred (200) feet southwesterly from the southwest corner of Alpine (formerly Virgin) Street, and New High Street, thence Southwesterly along the said westerly line of New High street seventy-three (73) feet to a point; thence westerly and at right angles to said westerly line of said New High street sixty-five (65) feet to a point; thence northeasterly and at right angles to last mentioned course and distant and parallel with said westerly line of New High street seventy-three (73) feet to a point, and thence easterly by a straight line sixty-five (65) feet to said westerly line of New High street, at the point of beginning or commencement, and being parts of lots ten (10) and eleven (11) in Block thirty-three (33) of Ord's Survey, as per map recorded in the office of the County Register of Los Angeles County, in Book 53, page 66 et seq. of the Miscellaneous Records of said Los Angeles County, appraised at the sum of

\$ 600.00

Lots nine (9) and ten (10) of Peck's subdivision of Block seventy-four (74) in the City of San Pedro, Los Angeles County, California, appraised at the sum of. . . . . 3000.00

Lots nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), and twenty-nine (29), in Block "C", Peck's subdivision of Carolina tract, in the City of San Pedro, Los Angeles County, State of California, appraised at the sum of. . . . . 600.00

Amount carried forward. . . . . \$4200.00

Twenty (20) acres of land in Orange (formerly Los Angeles County) County, California, known as the West one-half of the Southwest quarter of the Northwest quarter of section twenty-four (24) Township five (5) South, Range ten (10) West, San Bernardino Base and Meridian, appraised at the sum of. . . . . 600.00

(formerly Los Angeles County)  
Sixty acres of land in Orange County, California, known as the Southwest quarter of the Southeast quarter and the South half of the Northwest quarter of the Southeast quarter of section four, (4) Township five (5) South, Range ten (10) West, San Bernardino Base and Meridian, appraised at the sum of. . . . . 1400.00



One promissory note for \$400.00, signed by F. C. Richter, appraised at the sum of . . . .	400.00
Household furniture, appraised at the sum of . . . . .	100.00
	<hr/>
TOTAL,	\$ 6700.00

The whole of the estate mentioned in the foregoing inventory is community property as far as can be ascertained from said Administratrix.

We, the undersigned, duly appointed appraisers of the estate of Ferdinand Fensky, deceased, hereby certify that the property mentioned in the foregoing inventory has been exhibited to us, and that we appraise the same at the sum of Six Thousand and Seven Hundred dollars (\$6,700.00)

Dated October 24th, 1903.

Adolph Muller, Appraiser.

S. A. Cline, Appraiser.

W. H. Munroe, Appraiser.

FILED Oct. 26, 1903. C. G. KEYES, Clerk, By  
W. L. Warren, Deputy.

A copy of the said inventory and appraisement is annexed as an exhibit to the amended answer of J. H. Merriam, and to the amended answer of Eugene Wellke, et al., on file in and a part of the record of this action.

Thereupon it was stipulated between the parties that all three of the appraisers named in said inventory and appraisement, are dead.

(Testimony of Laura M. Coughlin.)

LAURA M. COUGHLIN,

a witness called on behalf of the plaintiffs, testified as follows:

Mrs. Pickens, plaintiff in this action, is my aunt. Ferdinand Fensky is my uncle, and Frederick Fensky is my father. For several years prior to 1901, I resided at the home of Ferdinand Fensky and his wife, Jeanette Fensky, in Topeka, Kansas. Mr. and Mrs. Fensky moved from Topeka to California in the fall of 1901. I used to drive out with Mr. Fensky to make his collections. While I was living with them I never knew of any property in Kansas that was owned by Mrs. Fensky individually, — I mean property that was deeded to her that she drew income from. I visited them in San Pedro, California, prior to Mr. Fensky's death. I returned to Kansas and was living there when he died. I returned to California after Mr. Fensky's death. I visited Mrs. Fensky frequently. Mr. Fensky visited California in 1889 or 1890. I do not know how long he remained.

After Mrs. Fensky's death I was present at Mr. Merriam's office at a conference of Mrs. Fensky's relatives. This was the next week after her death. Mr. Thompson, Mrs. Schmidt and Mrs. Farnsworth were present. Mr. Thompson is Mrs. Katzung's son-in-law. I was called to the conference by Mr. Merriam. I had a statement for \$200 and presented it. They told me if there were funds left after the claims had been put in, I should have my \$200. Mr. Thompson mentioned that it might appear as a bribe. Mr. Merriam said it

(Testimony of Laura M. Coughlin.)

was a gift causa mortis. The \$200.00 was what my aunt had left me. The papers were found in the stove in Mrs. Fensky's house and were taken out by my daughter.

I was at Mr. Merriam's office on two or three occasions. On one occasion within a month after Mrs. Fensky's death, Mr. Thompson, Mrs. Schmidt, Mrs. Farnsworth and Mr. Merriam were present. The conference was held in Mr. Merriam's office. Mr. Merriam asked me if I corresponded with my father, and if there was any probability of his coming out here. I told him there might be, and that he was not satisfied with the settlement of the Ferdinand Fensky estate. I can't remember whether anything was said concerning his coming here to make a contest or any other purpose of his coming here.

HENRY H. SCHMIDT,

a witness called on behalf of the plaintiffs, testified as follows:

I am the son of Alma J. Schmidt, one of the defendants in this action. After the death of Mrs. Jeanette Fensky I was present at fifteen or twenty, possibly twenty-five conferences in Mr. Merriam's office in Pasadena, concerning the settlement of her affairs. At some of the earlier conferences we touched upon the delivery of the deeds. I cannot recollect just when the delivery of the deeds was first mentioned. The conference at which the delivery of the deeds was discussed was in Mr. Merriam's office. Mr. Thompson,

(Testimony of Henry M. Schmidt.)

Mrs. Farnsworth, myself and possibly my mother were present. The question of delivery or non-delivery of the deeds was discussed. I have no recollection of just what was said, but we did discuss the delivery of those deeds.

Q BY MR. WILSON: Well, did you or anyone else present say that the deeds were not delivered prior to Mrs. Fensky's death?

A No. We were not afraid of that so much in regard to the delivery of the deeds, but it seemed like there had been a certain amount of bad feeling between the family, on Mrs. Fensky's side and on Mr. Fensky's side, as regards to the property, and it seemed like there was certain interests in the Fensky side here at that time stayed over -- came down to the funeral and stayed over, and it seemed like also, as well as I can recollect, that we were afraid of the other side attacking the estate, at that time. We never had any experience in that regard, but I know we discussed it, that the estate might be tied up, and it would be years before we got anything out of it. Also, there was a little difference of opinion regarding the valuation of the property which the three heirs had received, and we thought that it was best to bury the hatchet and leave the deed stand the way they were.

Q Well, all right. Now, there seemed to be two questions there: first, you were afraid of the Fensky heirs, and second, there was a division among Mrs. Fensky's heirs as to whether the property had been equally divided, is that it?



(Testimony of Henry M. Schmidt.)

A Yes, sir.

Q All right, And you decided to bury the hatchet among yourselves and take what had been transferred by these deeds, in order to avoid a contest by the Fensky side, is that it?

A I suppose that was it.

Q Well, had any of the Fensky heirs made any threats of contest?

A No.

Q What made you fear a threat of contest by the Fensky heirs?

A I don't know how it got started, but we figured on account of two of them staying here and Mrs. Coughlin and Corrine --

Q You refer to Corrine Loveland?

A Yes.

Q Well now, what did they do to make you afraid of the contest?

A Well, different things were said, not to me directly. I don't know how it got started, but that was the supposition, that they were going to attack the estate.

Q Well, what had you heard to give you that supposition?

A I can't state. It was talked of and discussed amongst those present at these conferences.

Q Well, what supposition did you have or what supposition was expressed by anyone at those conferences concerning what might happen?

A As to any individual expression, I couldn't say at this time. I have a remembrance of it being expressed.

(Testimony of Henry M. Schmidt.)

Q Well, what was said about any possibility of a contest by the Fensky heirs?

A I can't recall just the words, excepting that I have a remembrance that they thought there would be a chance of contest at that time.

Q Who made such a statement as that?

MR. POORMAN:: I am going to object, your Honor, as irrelevant and immaterial. The prize package has been opened.

THE COURT: Well, we haven't gotten at the bottom of it yet. Let's see what there is in it.

MR. WILSON: Well, I think we can realize the situation of this witness. He is the son of one of these defendants.

THE COURT: Go on.

MR. POORMAN: We have never talked to him, so we don't know what it is.

MR. WILSON: What is the question?

(Question read).

Q Who made a statement at the conference that you referred to, that there might be a contest by the Fensky heirs?

A I can't recall just who made it, excepting that we discussed it. I remember that very distinctly.

Q Well, now, was there any reason given as to why there would be a contest of the Fensky heirs, or what kind of contest it would be?

A I can't remember.

Q You stated a while ago that something was mentioned at this conference concerning the non-delivery

(Testimony of Henry M. Schmidt.)

of the deeds that Mrs. Fensky had signed before her death. Now, tell us what was said concerning that matter.

A I can't remember just the words. I remember, though, that we had a discussion at a meeting or two, but I can't remember just what led up to it.

Q Well, can you remember who made any statements about the matter?

A Oh, as near as I can recollect there was several made statements -- not statements, but they discussed the matter, and Judge Merriam advised us as to the matter, and also helped in the discussion.

Q Well, did someone there state that the deeds had not been delivered before her death?

A No, I don't believe there was any delivery of the deeds discussed at that time, but we were afraid of the other parties coming in and attacking them.

Q Well, for what reason were you afraid that they would attack the deeds?

A I can't state the reason.

Q Was there any discussion there as to the grounds upon which the attack might be made?

A No, only as I related before, that there was a kind of bad feeling in regard to the division of the property. Some thought Corrine Loveland shouldn't get what she got, Mrs. Farnsworth thought her father didn't get enough, and we got warngling amongst ourselves in regard to the division of the property, and the other people being here -- Mr. Fred Fensky and Mr. Richter stayed over for about a week, and it seemed like we

(Testimony of Henry M. Schmidt.)

were all scared that something would happen about the property, and we were all satisfied afterwards to keep what was left.

Q So that because of your fear of a contest with the Fensky side, you settled your own differences among yourselves and accepted what you had?

A I think so.

Q Even though you did feel that some of Mrs. Fensky's relatives got more than what they were entitled to?

MR. POORMAN: I object to that. The witness has not made any such assertion.

A As near as I can recollect we were satisfied with what we received from it.

MR. POORMAN: It is immaterial, anyway.

THE COURT: I don't see what difference it would make with the case.

MR. WILSON: No, I think not.

THE COURT: Evidently this prize package isn't a capital prize, much less of significance.

MR. WILSON: Well, I think there is a capital prize, if the Court please, if we could get to it.

THE COURT: Well, I will give you the benefit of everything except the corkscrew.

MR. WILSON: I realize that, your Honor.

MR. POORMAN: I think we need an oil drill.

Q BY MR. WILSON: Now, Mr. Schmidt, you stated a while ago concerning this discussion regarding the possibility of a contest with the Fensky heirs that



(Testimony of Henry M. Schmidt.)

Judge Merriam gave you some advice that helped you considerably. What did he advise you about?

A Well, one main point of his advice was not to wrangle amongst ourselves, and be satisfied with what we got, and leave the deeds stand the way they were and leave the property stand that way; and also, if we didn't, it might leave the other side a channel to come in and attack us if we got to fighting amongst ourselves.

Q Well, did he tell you upon what ground the other side might attach you?

A No, I don't believe he did.

Q You say he did not?

A I don't recollect that he did.

Q Well, do you recollect that he did not?

A No.

Q So you don't know whether he did, or not?

(No answer)

Q Was there any discussion at any of these conferences concerning putting the property in the inventory in Mrs. Fensky's estate, that was covered by the deeds?

A Yes, I believe there was.

Q Well, now, tell us what was said about that.

A That was when we were kind of -- some of the heirs seemed to be dissatisfied with their portion -- what they got. As near as I can recollect, what led us to that was, Mrs. Farnsworth was left a piece of property -- she was the only niece or nephew that was left anything in the estate and she was dissatisfied

(Testimony of Henry M. Schmidt.)

with the portion that her father got. That is really what led up to the whole argument, I think.

Q Well, now, what was said about the inventory?

A Well, in regards to putting it all back into the estate. That is what led up to that.

Q Did Judge Merriam suggest that it be put in the inventory or kept out of the inventory?

A Not to my recollection, but I remember there was some discussion about putting it all back into the estate. I was one that wanted that done.

Q You wanted it put in the inventory?

A Yes.

Q Who suggested that it be omitted from the inventory?

A Well, I guess we all did; that it was best not to put it in.

Q Some opposed you in regard to putting it in?

A I had a feeling that we all may be better off, that is, the main heirs would be better off if all the property was put into an inventory and divided into equal portions; and Mrs. Farnsworth's property and Miss Loveland's would have to go into the estate. That was my contention at that time.

Q Well, what advice did Judge Merriam give you about the inventory?

A Well, after we discussed it pro and con, we all agreed to let it stand the way it was, thinking it best for all concerned, to leave the deeds stand the way they were.

(Testimony of Henry M. Schmidt.)

Q Well, was that also because of your fear of a contest with the Fensky heirs?

A Partly so, I think.

Q Well, now Mr. Schmidt, at some one or more of the conferences that you have mentioned, wasn't the reason expressed by someone present as to why the Fensky heirs would contest the matter, that the deeds executed or signed by Mrs. Fensky before her death had not been legally delivered?

A No, I have no recollection of that.

Q You have no recollection of anything of that kind?

A There was some discussion in regard to the delivery of the deeds, but --

Q Can't you remember anything that was said about the delivery of the deeds?

A No.

Q Not a thing?

A Nothing definite.

Q Can you remember anything that Mr. Thompson said during any of these conferences concerning any of these deeds?

A MR. POORMAN: I object to that as incompetent, irrelevant and immaterial.

Q THE COURT: Overrules.

A No, not that I could testify to.

Q By MR. WILSON: What is that?

A I don't remember anything, that I could testify to. It was discussed, but who said it or what it was, I can't recall.

Q Were you present in Judge Merriam's office when Mr. Thompson expressed the belief or opinion that the

(Testimony of Henry M. Schmidt.)

deeds were not valid because they had not been delivered prior to Mrs. Fensky's death?

A I can't answer that question.

Q Why can't you answer it?

A Why, I have no recollection of it. As I stated before I remember we discussed the delivery of the deeds, but just what Mr. Thompson said or anybody said, I have no recollection of it.

Q Now, within a very few days after Mrs. Fensky's death the grantees in those deeds conveyed property among themselves, didn't they?

A Yes, sir.

Q Transferred this about?

A Yes, sir.

Q What did you have to do with that?

MR. EDWARDS: I object to that as immaterial.

THE COURT: Overruled.

A My mother transferred one or two pieces of property in my name and in my brother's name.

Q BY MR. WILSON: Did you or your brother pay anything for that property?

MR. POORMAN: Objected as irrelevant and immaterial.

THE COURT: Overruled.

A No

Q BY MR. WILSON: Was your mother making a gift of that to you or just conveying it to you to get it out of her name?

A Just conveyed it to me to get it out of her name.

Q Now, why was that done?



(Testimony of Henry M. Schmidt.)

A Well, because she thought we were wise enough, I guess to keep the property, -- to keep the other side from attacking it.

Q Well, now why --

A As stated before, because we were afraid they were going to attack it.

Q Did you and your brother convey any of that property back to your mother later?

A Yes, sir.

Q BY THE COURT: Did anybody advise you that by a simple device of transferring the property from her to you, with no consideration passing, that you could protect any rights that you might have?

A No, sir; I had no experience with that.

THE COURT: Go on.

Q BY MR. WILSON: When and where was the matter of transferring this property in the manner you have mentioned, discussed?

\* \* \*

A Oh, I suppose it was discussed at my mother's house, Pasadena.

Q BY MR. WILSON: Didn't you have a conference in Judge Merriam's office concerning it?

A Not in that regard, no sir.

Q Did you discuss the matter with Mr. Thompson?

A I don't believe I did.

Q Isn't it a fact that Mr. Thompson made a suggestion to you that if the property could get into the hands of an innocent purchaser, that it would be protected?

A I don't think he did.

(Testimony of Henry M. Schmidt.)

Q Were you present at any conference in Judge Merriam's office when Mr. Thompson made any such statement as that?

A I don't think so.

Q Were you present in Judge Merriam's office when Mr. Thompson made a statement that in his opinion the deeds made by Mrs. Fensky were invalid, but that there was a way to protect yourselves by transferring the property to an innocent purchaser, and that so far as he was concerned, he was going to see that Mrs. Katzung did so?

A I don't remember.

Q You heard no such statement as that, or don't remember any such statement?

A No.

I had a power of attorney to act for my mother, the same being on record in this county.

LOUISA PICKENS,

one of the plaintiffs called in her own behalf, testified as follows:

I am one of the plaintiffs in this action. I am a sister of Ferdinand Fensky, deceased.

Q When, Mrs. Pickens, did you first have any knowledge concerning the non-delivery of the deeds involved in this action that were signed by Mrs. Fensky, purporting to convey certain property in California to her brothers and sisters in this action?

MR. POORMAN: Objected to as irrelevant.

\* \* \*

(Testimony of Louisa Pickens.)

THE COURT: Overruled.

In 1913, I had my first knowledge concerning the non-delivery of the deeds involved in this action that were signed by Mrs. Fensky, purporting to convey certain property in California to her brothers and sisters. The knowledge was obtained through our attorney. He investigated the estate after my daughter had been to California in 1912. I employed him to make the investigation.

Q Now, when did you first have any knowledge concerning the value of the California estate, or of the Estate of Ferdinand Fensky in California, other than what is contained in the inventory on file?

MR. POORMAN: Same objection.

THE COURT: Same ruling.

In 1913 I also received my first knowledge concerning the value of the Ferdinand Fensky estate in California, other than what is contained in the inventory on file. I obtained that knowledge in the same manner.

WILLIAM THOMPSON,

a witness called on behalf of the plaintiffs, testified as follows:

#### DIRECT EXAMINATION.

I am a son-in-law of Mrs. Katzung, one of the defendants in this action. I had a general power of attorney from Mrs. Katzung, and had all to do with the estate as far as her interest was concerned. Within a few days after Mrs. Fensky's death there was a meeting of her relatives in Mr. Merriam's office in

(Testimony of William Thompson.)

Pasadena. I, Mr. Merriam, Mrs. Schmidt, Mrs. Farnsworth and Mr. and Mrs. Wellke were present.

Q State whether or not on that occasion there was any discussion as to whether or not the deeds that Mrs. Fensky had signed prior to her death, were delivered?

\* \* \*

MR. EDWARDS: Objected to as incompetent, irrelevant and immaterial.

\* \* \*

THE COURT: Overruled. It will be admitted for a limited purpose.

\* \* \*

A I don't think at that time \* \* \*

Q BY MR. WILSON: Was there a discussion at any time within a few days or three weeks after Mrs. Fensky's death, as to these deeds, Mr. Thompson?

A There was a doubt arose --

Q No, just answer the question, as to whether or not there was a discussion in Mr. Merriam's office.

A There had been some talk of it.

Q Now, can you state when and where the talk was had, and who was present?

A Why, I judge -- I can't tell for certain, it is a long time ago. I presume it was in Mr. Merriam's office; that is the only place I had any talk with him in regard to it. \* \* \*

Q BY MR. WILSON: Who was present, Mr. Thompson, besides yourself?

A I expect the same lot that I was with before.



(Testimony of William Thompson.)

Q BY THE COURT: You expect the same lot? Do you have any recollection about it, or not?

A I have a recollection that that is all the places that I discussed this matter with them.

THE COURT: All right; go on.

Q BY MR. WILSON: Now, state what was said by anyone present, Mr. Thompson, as nearly as you can remember, as to those deeds?

MR. POORMAN: Same objection.

THE COURT: Same ruling.

A Why, my understanding is that Mr. Merriam expressed a doubt as to the validity of those deeds.

Q BY MR. WILSON: Well, what did he say, if you remember?

A That they hadn't been properly delivered.

Q And what did any of the rest of you say in response to what he said?

A I don't think they entered into the discussion at all.

Q Well, did you?

A Well, I took precautions to fix mine.

Q Well, did you enter into the discussion?

A I presume so.

Q Well, what did you say in response to what Mr. Merriam said?

A Well, there wasn't much for me to say. I don't remember that I said very much.

Q Well, did you say anything as to whether the deeds were or were not delivered?

A I didn't know; I wasn't a lawyer.

(Testimony of William Thompson.)

Q Well, did you say anything to Mr. Merriam as to -- I am not talking about what you knew, but I am asking you about what you said to Mr. Merriam. Did you say to him that in your opinion the deeds were or were not delivered, or anything to that effect?

A Well, I couldn't tell you that. I couldn't answer that question; I couldn't say that I did or I didn't.

Q Did you say anything to Mr. Merriam or to any of the persons present at that time, as to what had been done with reference to Mrs. Katzung's property?

MR. POORMAN: Objected to as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

A I don't think that Mrs. Katzung's property -- there had been anything done with it at that time.

\* \* \*

Q BY MR. WILSON: Did you at any meeting within a few days after Mrs. Fensky's death, at Judge Merriam's office, at which the persons were present that you have referred to, make any statement concerning what had been done with Mrs. Katzung's property and why it had been done?

\* \* \*

A I told them what had been done.

Q Well, what did you tell them?

A I told them Mrs. Katzung's property had been sold.

Q Did you tell them why you had sold it, or attended to the sale, if it was sold?

A Well, no; I think I rather took a defiant attitude.

Q Yes. Well, now, did you tell them that you had

(Testimony of William Thompson.)

obtained any advice concerning the property, or how to handle the property so as to perfect your title or her title?

A I told them the property had been sold, and the receipts were in a certain office, and they could go there and see what had been done.

Q Well, now, that all took place within about ten days after her death, didn't it?

A It took place very soon.

Q And the sale was made to your wife?

A To my wife.

Q And isn't it a fact, Mr. Thompson, that that was done because you had had advice that those deeds hadn't been legally delivered, and there was a question about Mrs. Katzung's title?

MR. POORMAN: Objected to as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. POORMAN: Suggestive and leading.

A I had that advice.

\* \* \*

Q Did you tell any of the people at this meeting that you referred to that you had such advice?

A I won't be sure.

\* \* \*

Q Was anything said at that meeting or at any meeting within a few days or weeks after Mrs. Fensky's death, as to whether or not this property should be inventoried in her estate?

A Why, it was suggested by Mr. Merriam that this

(Testimony of William Thompson.)

property be pooled and held by us, and the deeds set aside.

Q Did he give any reason to you or at that meeting for giving such advice?

MR. POORMAN: Objected to as immaterial and irrelevant.

THE COURT: Overruled.

A Well, the reason was that the deeds were not valid.

Q BY MR. WILSON: Can you state anything else at the meeting referred to, or any other meeting at which the same persons were present, relative to the validity of the deeds or the placing of this property in the inventory of Mrs. Fensky's estate?

A Why, it was suggested by some of the parties that this property should be pooled; some of them were not satisfied with what share of the property they had got, and wanted to pool the property and divide it up, each one to take a third -- have it inventoried. And it had got so far along that I wouldn't submit to it.

There was some money in the bank which Mrs. Farnsworth had right to draw while Mrs. Fensky lived. After Mrs. Fensky died, Mrs. Farnsworth drew all of the money from the bank and put it in the bank in her own name. Within a few days afterwards Mrs. Farnsworth admitted to me that she had done so and I insisted that she immediately take the money from the bank and put it where it belonged. I think she took it from the bank and turned it over to the administrator. There was also about \$800.00 in another bank in the joint names of Mrs. Fensky, Mrs. Schmidt



(Testimony of William Thompson.)

and Mrs. Katzung. Mrs. Katzung drew that money from the bank and eventually turned \$400 of it over to Mrs. Schmidt. I do not think that was brought to the attention of Mr. Merriam. That was not paid into the estate at all.

Prior to the commencement of the case of Farnsworth against Ferguson in the Superior Court, Mr. Merriam requested that Mrs. Katzung pay a portion of the plaintiff's attorney's fees in that suit. Mr. Merriam stated that he thought it was the duty of the heirs to pay the costs of Mrs. Farnsworth suit to obtain the property that Mr. Ferguson was holding. I insisted that if the property did not belong to Mrs. Farnsworth it belonged to the heirs, and if he wanted to go after Mr. Ferguson about the property for the heirs we would pay the costs, and if it was for Mrs. Farnsworth she must pay her own costs.

#### CROSS EXAMINATION.

Q Mr. Thompson, isn't it a fact that you sought to be appointed administrator of the Estate of Jeanette Fensky?

A That I sought to be?

Q Yes, sir.

A It is not.

Q Never made any suggestion as that?

A I never made any such suggestion of that kind.

Q To Mrs. Farnsworth?

A Nor to any person else.

Q Isn't it a fact that Judge Merriam was appointed over your opposition, as administrator?

(Testimony of William Thompson.)

A It is not.

Q You have no animus toward Judge Merriam, have you?

A How is that?

Q You have no ill feeling toward Judge Merriam, have you?

A No, I have not.

Q Nor any of the other defendants in this action?

A None of the other parties in this action.

Q Now, did you ever present any claim against the Estate of Jeanette Fensky, as one of the creditors of that estate?

A As one of the creditors of that estate?

Q Of Jeanette --

A For Mrs. Katzung?

Q Yes, for Mrs. Katzung.

A I did.

Q Do you recall what that claim was for?

MR. WILSON: Wait a minute: I object as not being the best evidence. The claim is part of the record.

THE COURT: What is the purpose of it?

MR. POORMAN: Simply to show his animus towards the parties in this action.

THE COURT: Overruled. Go on.

A In the first place, I presented a claim against the estate for \$750 borrowed money that Mrs. Fensky borrowed from Mrs. Katzung.

Q BY MR. POORMAN: And what action, if any, was taken on that claim?

(Testimony of William Thompson.)

A The Schmidt people agreed to allow that claim. Mrs. Farnsworth, in behalf of her father, objected to it, and Mr. Merriam stood with Mrs. Farnsworth, and the claim never was paid.

Q Was it allowed?

A It never was allowed.

Q Did you ever sue on that claim?

A — I never did.

Q Now, isn't it a fact as a result of the rejection of that claim, you entertained very bitter feelings toward Judge Merriam?

A Not particularly against that claim — — on account of that claim.

Q Well, do you entertain any ill feelings toward Judge Merriam at all?

A Well, now, you getting down to personalities.

Q Oh, absolutely.

A As far as Mr. Merriam is concerned, I want him to keep away from me and let me alone. I want nothing to do with him.

Q Well, that is what I want.

A Well, that is right.

Q I thought you felt that way. When did this hostility toward Judge Merriam start — — this desire to have him leave you alone?

A How is that?

Q When did your hostility that you have spoken of toward Judge Merriam, start?

A When did it start?

Q Yes.

(Testimony of William Thompson.)

A There is a question that I can answer. It started when I demanded an accounting of Mrs. Farnsworth for the moneys that had been received and spent during Jeanette Fensky's illness; and when I got that account -- that report; and found that it had been made in Mr. Merriam's office with the assistance of his clerks, it started right then.

Q It started right then?

A Yes, sir.

Q It had no connection with Mrs. Katzung's claim or the disallowance of it?

A No, sir.

Q Not whatever?

A Not at all. That was previous to this.

Q That was prior to the disallowance of the Katzung claim?

A How is that?

Q I say, your hostility about the Farnsworth accounting was long prior to the disallowance of the Katzung claim?

A That is right.

Q Now, Mr. Thompson, I show you a letter dated "Box 671, San Luis Obispo, 1 - 19 - 09," addressed to J. H. Merriam, Esq.," signed "Wm. Thompson," and ask you whether you wrote that letter (showing)?

A I did. I can see that before I start on the letter.

Q Now, Mr. Thompson, I call your attention to this passage appearing on the second page of the letter.

A Just let me read the whole business -

Q Just a moment: I want to call your attention to



(Testimony of William Thompson.)

one passage. You have identified the letter. To this passage: (Reading) "And as for my hostility towards you, it doesn't occur until after you turned entirely around and advised that the claim of Mrs. Katzung be not acted upon, after just one moment previous when it seemed impossible to get an agreement, you were advocating an amicable settlement, and I believed then, as I believe now, that had it not been for the stand taken by you that we would have come to some understanding about the whole account. At least, I believe so, as far as Mrs. Schmidt's interest was concerned." Didn't you make that statement?

A I did.

Q You did make that statement?

A I did make that statement.

Q And that statement was correct, was it not?

A You must remember that one hostility after another adds venom -- fuel to the fire.

Q Yes; that is very interesting.

A I could overlook everything else if he had been decent about that.

\* \* \*

Q BY MR. POORMAN: Did you sue on the claim? I am not sure whether I asked you that. Did you sue on the claim?

THE COURT: He said he did not.

Q BY MR. POORMAN: For borrowed money?

A I didn't sue on any claim.

Q You said that Mr. Merriam at one of these interviews expressed doubt as to the validity of the deeds?

(Testimony of William Thompson.)

A There is no question about that.

Q He did so express himself?

A He did.

Q To you?

A Not to me, particularly.

Q But in your hearing?

A In a general way.

Q Did he state the reason for the invalidity?

A That they were not properly delivered.

Q Now, isn't it a fact that the only discussion in Judge Merriam's presence questioning the validity of the deeds, had to do with the competency of Mrs. Fensky?

A Had what?

Q Isn't it a fact that the only discussion in Judge Merriam's presence questioning the validity of the deeds, had to do with the competency or incompetency of Mrs. Fensky?

A I don't understand it so, and never did.

Q Then, am I to understand you to say that it is not a fact that her incompetency was discussed by Judge Merriam?

A I haven't said that.

Q Well, then, what was said by Judge Merriam regarding the competency or incompetency of Mrs. Fensky as affecting the validity or invalidity of these deeds?

A Mr. Merriam had a doubt whether Mrs. Fensky was in the position to make those deeds when she made them.

(Testimony of William Thompson.)

Q Did he use the words "in the position"?

A Mentally.

Q Yes. What was said in that connection by Judge Merriam and in reply thereto by the persons to whom he was speaking, if anything?

A Well, I can't tell you just what was said, but there was a doubt as to Mrs. Fensky's responsibility when she made those deeds -- her mental responsibility.

Q I understood you to say that you put your foot down on the pooling of the interest.

A I did.

Q That is, that you wanted to support the deeds, did you not?

A I did support them.

Q So that, so far as you were concerned, there was no doubt as to the validity of those deeds, was there?

A As far as I was concerned, the deeds showed me what Mrs. Fensky intended Mrs. Katzung to have.

Q And didn't they show you --

MR. WILSON: Wait a minute:

A And as representative of Mrs. Katzung, I was satisfied and determined to secure what belonged to her, if possible.

Q BY MR. POORMAN: Yes.

A And I did so.

Q Did you make a statement that you were going to make a transfer, or advised her to make a transfer of that property so that there could be no reaching it by the Fensky heirs -- the Ferdinand Fensky heirs?

A I never did.

(Testimony of William Thompson.)

Q You never stated that?

A No, sir.

Q You had been advised, as I understand you to say, that the deeds were invalid because they had not been delivered?

A I was.

Q Then, will you explain why it was that you insisted that the parties interested should proceed under those invalid deeds, when you represented Mrs. Katzung's interest?

A I went to the best authority I could find -- Judge Unangst Superior Judge Unangst, of San Luis Obispo, and I told him the condition of these deeds exactly as I knew them. And he told me, those deeds, as they stood, if there was a dispute arose, would not hold water. That was his words. He said if that property was sold prior to the dispute being raised about those deeds, and an innocent party got hold of the property, that they could not be taken away from them. I told Mrs. Katzung what Judge Unangst had told me. I did not advise her one way or the other. I told her just what those things were. Mrs. Katzung and her son Frank, and my wife, her daughter among themselves arranged that my wife should buy that property. I wasn't present and knew nothing about it. My wife did buy it, and it was paid for and the money was passed and the receipts taken in Mr. Ferguson's office, and Mr. Parmele, that you had on the stand the other day, was the man that did the business, as notary public. After that was done, and the property had passed



(Testimony of William Thompson.)

into my wife's hands, I never took a bit of interest in the affairs of any of the rest of them from that time on, see. I was perfectly willing that aunt Jennie had a hundred thousand dollars, and it had been divided among them. I never went to see any of them or look for any piece of property that they had.

Q So long as Mrs. Katzung, by this scheme of passing the property on to an innocent purchaser, was enabled to retain the fruits of those invalid deeds, you didn't care; isn't that about it?

A I didn't care?

Q No, you didn't care.

A Well, now, just explain yourself, what you mean by that.

Q Well, as long as Mrs. Katzung profited by the invalid deeds, you didn't care if the deeds would be set aside as to all other persons who had taken deeds?

A I had no reason to care. I was only looking for Mrs. Katzung --

Q Exactly.

A That is all.

Q Did you ever discuss with your wife, prior to the purchase by her of Mrs. Katzung's property, the possibility of her deed being invalid?

A Why, I didn't only discuss it, but I told Mrs. Katzung and Mrs. Thompson what Judge Unangst had told me.

Q Told Mrs. Thompson too?

A I did.

(Testimony of William Thompson.)

Q Does Mrs. Thompson at this time retain that property? Does she retain it now, today?

A No.

Q She does not. When did she dispose of it?

A Oh, some of it was disposed of very soon, and some of it has been disposed of afterwards.

Q Did you handle the sale of that property for Mrs. Thompson?

A I did.

Q Did you disclose to the purchasers the invalidity of the deed under which Mrs. Katzung had originally taken it?

A I left the purchasers to do just what I did. I went to the title guarantee company and looked after that property and saw how the deeds were fixed and got a guarantee of the title, and left them just the same. I wasn't supposed to tend to their business; I was tending to mine.

Q So you did conceal from them the fact that despite the record title being in Mrs. Thompson, she knew that she had taken under an invalid deed to Mrs. Katzung, and that she had no actual title to the property; is that what I am to understand?

A She didn't know any thing of the kind.

Q Didn't you state that you had disclosed it to her?

A I said those deeds were perfectly valid, as far as Mrs. Katzung was concerned. There had never been any dispute arisen about those deeds at that time.

Q Now, you had at that time secured Judge Unangst's opinion, hadn't you?

(Testimony of William Thompson.)

A I had.

Q And had stated it to Mrs. Thompson and Mrs. Katzung?

A I had; and Judge Unangst's opinion was --

Q Yes. I don't want to hear that. Just a minute: And that opinion, of course, had been rendered and had been disclosed to Mrs. Thompson long before she had deeded the property through your negotiations to other parties, hadn't it?

A Not very long, no, sir.

Q Well, it had been disclosed before?

A Yes, but not long.

Q The discussion of the invalidity of the deeds occurred how long after Mrs. Fensky's death? I am referring to the discussion at Mr. Merriam's office, when he was present?

A Well, my understanding, you know, was general, right away, to begin with.

MR POORMAN: Now, we move to strike that out.

THE WITNESS: Well, all right.

Q Just answer the question, Mr. Thompson.

A Well, now, how will you have it answered?

MR. POORMAN: Well, let him read the question and you get it.

(Question read).

A Well, before Mrs. Fensky's death and after Mrs. Fensky's death.

Q Wait a moment: Answer that question, please

Q BY THE COURT: How long after she died did you have this discussion? That is the question.

(Testimony of William Thompson.)

A That isn't the question that he asked me.

THE COURT: Well, all right; go on.

Q BY MR. POORMAN: Now, didn't you say the transaction was within a few weeks?

A Yes, but that doesn't say how long. A few weeks isn't how long. You asked me to tell the date; I can't tell it.

Q I didn't ask you to tell the date.

A Well, within a few weeks, I would answer it.

Q Was that discussion before the deed by Mrs. Katzung to Mrs. Thompson?

A I can't tell you.

Q Was that discussion before you had got Judge Unangst's opinion?

A I don't think it.

Q You think you got Judge Unangst's opinion first?

A Yes, sir.

Q You stated, did you not, that Judge Merriam suggested that the property be inventoried because the deeds were invalid -- inventoried in Jeanette Fensky's estate?

A Why, I think so, yes.

Q He did suggest that?

A I think so.

Q Do you remember when he suggested that?

A Within a few weeks.

Q At about the same time that this other discussion occurred?

A No, about that time.

Q Was it at the same meeting?



(Testimony of William Thompson.)

A I can't tell you that.

Q Did you say anything to him about Judge Unangst's opinion at that time?

A I did not.

Q You did not?

A I never said anything to him about Judge Unangst's opinion.

Q Why didn't you?

A I didn't think it was any of his business. I was getting that opinion myself, for my own benefit; I wasn't getting the opinion for the benefit of the whole family.

Q Didn't you think it was his business to know just what the status of the property was, in order that he might perform his duties properly as administrator?

A I do think so, but we were paying a lawyer \$500 to inform him of his duty and what his business was.

Q What lawyer did you pay that to?

A Mr. Merriam.

Q Oh, Judge Merriam was advising himself, do you mean?

A Yes.

Q Oh, I see. Now how is it, in view of the fact that you had Judge Unangst's opinion that the deeds would not hold water, that when the suggestion was made that the property be inventoried, as Mr. Merriam suggested, that you opposed it and put your foot down?

A Simply because at that time Mrs. Thompson had purchased that property. That property had passed out of the control of Mrs. Katzung at that time.

(Testimony of William Thompson.)

Q And Mrs. Thompson knew, did she not, that she held no title to it?

A She did not, and she doesn't know it yet.

Q Well, she knew, didn't she, that the deeds had not been properly delivered, according to Judge Unangst's opinion?

A Yes; but Judge Unangst told me how the deeds could be made valid.

Q Could be made valid?

A They were made valid, according to Judge Unangst's advice.

Q Now, wasn't Judge Unangst's advice to the effect that if the property was deeded to an innocent purchaser for value, that the property itself could not be recovered from that innocent purchaser?

A Judge Unangst --

Q Now, isn't that what he said?

A Tell it again.

(Question read)

A Why, yes; I said that a long time ago.

Q So that you knew and Mrs. Thompson knew that the deeds were not rendered valid by that fact, but it was simply a flimflam to get the property out of her hands and into the hands of a person they could not reach?

A Value was paid for that property.

Q Yes, but isn't it a fact that it was a flimflam?

A Well, you will have to find that out from Mrs. Katzung and Mrs. Thompson. I didn't advise them about that at all.

(Testimony of William Thompson.)

Q Didn't you engineer the deal?

A I did not.

Q Hadn't you gotten the opinion in the first instance?

A I got the opinion and they engineered their own deal. I never had one word of conversation with Mrs. Katzung or her family about what she should do with her property, not one word.

Q You just told them of that opinion as a matter of general information, did you?

A And left them to do as they saw fit.

Q Well, I suppose they could see through a millstone, couldn't they, with a hole in it?

\* \* \*

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Q Did Judge Merriam state for what reason he thought that the other heirs of Mrs. Fensky should pay Mrs. Farnsworth's attorney's fees in litigation of that character?

A Why, I couldn't say that.

Q He didn't state that?

A I understood, but he didn't say what reason he had to think that the heirs should pay Mrs. Farnsworth's lawsuits.

Q Now, Mr. Thompson, isn't it a fact that that suggestion was made not respecting attorney's fees in that litigation, but in connection with the employment of an expert in order to determine how much Mr. Ferguson owed the Jeanette Fensky estate?

A No.

Q That was not the fact?

A No.

(Testimony of William Thompson.)

Q Was any such suggestion ever made to you on behalf of or as the representative of Mrs. Katzung, that an expert should be employed to go over Mr. Ferguson's accounts in order to determine how much he owed the Fensky estate, and that those expenses should be defrayed by the heirs generally?

A That was done.

Q What is that?

A That was done, and the heirs paid \$15, I think, to Mr. Merriam's son to look after that.

Q And in addition to that, there was a suggestion regarding plaintiff's attorney's fees also; is that what I am to understand?

A Attorney's fees for Mrs. Farnsworth?

Q Yes, attorney's fees for Mrs. Farnsworth, in addition to the expert's fee?

A There certainly was. That was not in connection with that proposition at all.

Q It was not?

A No.

Q You opposed that, did you not?

A Opposed the attorney's fees?

Q Yes.

A I certainly did.

Q Now, isn't it a fact that the Jeanette Fensky estate was distributed to the heirs before the action of Farnsworth vs. Ferguson was commenced?

A I don't think so.

Q You don't think it was?

A No.



The deposition of

DON FERGUSON,

a witness on behalf of the plaintiffs, was offered and read in evidence as follows:

DIRECT EXAMINATION.

I reside in Lometa, Texas. In 1907 and 1908, and for some years prior thereto I was in the real estate and insurance business in Pasadena and Los Angeles. I was acquainted with Jeanette Fensky for about two years prior to 1907. I bought and sold real estate for her from about 1905 until her death, in 1908. I remember when she signed a number of deeds on September 18, 1907. She had had a conversation with me concerning the deeds shortly before that date. She spoke about making the deeds to her people and that she wanted them all to have a home. She stated that I was to hold the deeds until her death.

On the 18th of September, 1907, the day on which the deeds were signed I had a conversation with Mrs. Fensky, Mr. Parmele and Mrs. Farnsworth were present. I don't remember any one else being there when I went in. Mrs. Farnsworth and Mr. Parmele didn't remain in the room during all of the conversation. They both left for a time. Mr. Parmele came back, but Mrs. Farnsworth did not. Mrs. Fensky was ill in bed at the time. There was not very much said until after they went out of the room. Mrs. Fensky told Mrs. Farnsworth to go out for a time.

I think it was at that time that she said that she wanted to know that her people had a home and that

if anything was sold it would be replaced, or words to that effect. She said I was to hold the deeds until her death and then put them on record immediately.

She told me if I got a chance to sell any of this property at a profit to do it, and that we would make it right or words to that effect; I don't remember the wording. She gave Mr. Parmele a list of the names that she wanted the definite properties deeded to. Mr. Parmele prepared the deeds. He was a clerk and notary public in my office.

Q Did you go with Mr. Parmele back to her house when she signed the deeds?

A Yes, I was there. To the best of my knowledge, I was there, yes.

Q And was there any conversation at that time as to what should be done with the deeds after they were signed?

A The instructions were to hold them until her death.

Q And was anything else said as to the disposition of the property?

A I don't remember at that time just what she said.

Q Well, now what was done with the deeds after she signed them?

A They were left in my safe at my office.

Q Did they remain there until her death?

A Yes, sir.

I saw them the day they were put on record which was the day after Mrs. Fensky's death.

After Mrs. Fensky signed the deeds one piece of property was sold to a person named Chenoweth. I think the property was on Elmira Street in Pasadena.

At the time the deeds were signed she assigned two mortgages that then stood in her name. I won't be sure to whom the assignments ran, but I think Mrs. Schmidt was one. The mortgagors were Webster and Halbriter. I think the Halbriter mortgage was paid prior to her death. Mrs. Fensky executed a deed to Mr. Chenoweth for the property sold to him. On September 18, 1907, when Mrs. Fensky executed deeds to the property involved in this action, she signed a deed conveying to one of these defendants the property that was subsequently sold to Mr. Chenoweth. After her death when I recorded the other deeds I did not record the deed covering the Chenoweth property; by this I do not refer to the deed from Mrs. Fensky to Chenoweth but to the deed that she signed September 18, 1907, covering the same property.

After Mrs. Fensky's death I talked with some of the defendants relative to the deeds mentioned. I think I talked with all of them. I think the matter was discussed in Mr. Merriam's office with some of them when I was there. Mr. William Thompson was also there. I cannot state the conversation that took place a few days after Mrs. Fensky's death. I was there when it was discussed once that I remember of. Mr. Thompson brought up the question of whether the deeds were valid or not. That is my best remembrance, but I cannot go into the details of it all. My remembrance is that Mr. Thompson had seen an attorney somewhere and was quoting his decision. I think he contended that the deeds were not valid. I don't remember Judge Merriam making any statement in regard to the valid-

ity of the deeds. There was some conversation at that time concerning the delivery or non-delivery of the deeds. Mr. Thompson asked me the circumstances of my taking the deeds and recording them at her death. I explained the circumstances to him. Mr. Thompson gave some reason for claiming that the deeds were invalid but I don't remember what he said.

Q Did you, yourself, make any statement to Mr. Merriam at that time, or at any other time concerning the manner of the signing and the handling of those deeds?

A I think I did.

Q When and where?

\* \* \*

A I discussed the question of the validity of those deeds in my office with several of them, several of the heirs, -- well, I think with Mr. Thompson and probably, Mrs. Schmidt.

Q And did you have more than one discussion about the deeds?

A The matter was brought up once or twice.

Q And can you state now with whom you had such a discussion; you said with Mr. Thompson and Mrs. Schmidt?

A Well, Mrs. Schmidt asked me about it, and I told her that I did not know whether they were valid or not.

Q What did she ask you?

A—She says -- she asked me if I thought the way her property was deeded to her was legal. I think that is the way that she put it.



Q And what did you say to her in response?

A I told her that I did not.

Q Was anything further said at that time about the property or the way it was deeded to her?

A Yes, there was a good deal of talk about it, but I would not remember what was said.

There was also a conversation between me and Mr. Thompson as to whether the deeds were or were not delivered. Mr. Thompson was representing Mrs. Katzung.

Q Did you have any conversation with the defendant Merriam concerning the validity of the deeds?

A No, sir; not that I remember of.

Q Did you ever have a conversation with Mr. Merriam in which you expressed the belief that the deeds were not valid?

MR. HUNSAKER: That is objected to as leading and suggestive.

MR. POORMAN: And further as having already been answered; he said that he had none.

A I don't remember.

Q I will ask you whether you did not state to me in this office yesterday afternoon, Mr. Ferguson, that you did have a conversation with Mr. Merriam in which you told him that in your opinion, the deeds were not valid, and gave as the reason, that they were not legally delivered?

MR. HUNSAKER: That is objected to as incompetent, and hearsay, and attempting to impeach his own witness.

A Is that the language that I used, Mr. Wilson?

Q I am asking you if you did not so state?

A I did not make the statement in those words.

Q What did you state?

MR. HUNSAKER: Objected to as incompetent, irrelevant, hearsay and does not come within the issues; and impeachment of your own witness, and does not come within any of the rules concerning impeachment by a party of his own witness.

(Question read by reporter).

MR. POORMAN: Referring, of course, to yesterday's conversation here?

MR. WILSON: Yes.

A I meant to say that it was discussed in Judge Merriam's office by Mr. Thompson and myself and Judge Merriam; but I did not intend to give you what Judge Merriam said on the subject.

Q No, I have not asked you at all for what Judge Merriam said. My question was as to what you said to Judge Merriam. I have not yet asked you for anything that Judge Merriam said to you?

A Well, I think that I question the validity of the transaction, but as I was not an attorney, I was not competent to judge.

Q Well now, can you tell me what you said to Judge Merriam, giving your words as nearly as possible, when you say that you questioned the validity of the deeds?

MR. HUNSAKER: He has stated repeatedly that he was talking with Mr. Thompson, and he does not remember having had any conversation with Judge Merriam.

MR. POORMAN: The question is based upon assumption that is contrary to what is stated in the record.

Q The question that I am now asking is merely following the answer that the witness has just given, in which he stated the opinion that the deeds were not valid. Now I am asking him to state what he said.

MR. HUNSAKER: He said; "I think I questioned the validity of the deeds at Judge Merriam's office."

Q When you say that the validity of the deeds was questioned, was Judge Merriam present?

A Yes, sir.

Q Who was doing the talking, you or Judge Merriam?

A Mr. Thompson and I were talking in Judge Merriam's office, sitting at the long table.

Q In Judge Merriam's presence and hearing, I think you said?

A Yes, sir.

Q State what was said by you and what was said by Mr. Thompson?

A I made the remark that I questioned the validity of the deeds, but that I was not an attorney and was not competent to judge. Mr. Thompson quoted an opinion that he had got from some attorney up north, I think at San Luis Obispo, probably.

Q What did Mr. Thompson say?

A He said that his attorney told him that they were not valid, or something to that effect.

Q Did Mr. Thompson say they were not valid, or the

reason that his attorney gave for saying they were not valid?

MR. POORMAN: Objected to having already been answered, and suggestive and leading, in addition.

MR. WILSON: Well, I will withdraw that question and ask what further Mr. Thompson said concerning what his attorney up north had told him, if he had anything?

A I don't remember the reason that he gave, but he said that he had been advised that they were not legal, or words to that effect.

Q Did Judge Merriam make any response to that statement?

A I don't remember what he said; if he said anything, I don't remember what he said.

Q You have stated now all of the conversation that you can remember?

A All that I can remember.

The deed in the files of the case of Farnsworth against Ferguson from Jeanette Fensky to Alma J. Schmidt, covering lot 5 of the Lewis tract, Pasadena, covers the same property that was subsequently conveyed to Mr. Chenoweth which I have previously mentioned in my testimony. That is one of the deeds signed by Mrs. Fensky September 18, 1907, and delivered to me with the other deeds involved in this action. That deed was not recorded when I recorded the other deeds.

#### CROSS EXAMINATION.

I have not consulted any records or papers or written memorandum of any sort for the purpose of refreshing



my recollection as to these transactions. I am testifying from memory. Mrs. Fensky had been sick for some time prior to September 18, 1907. I had been in the habit of going to see her every day. She told me she wanted to dispose of her property and that she wanted to do it by deeding it to the people that she wanted it to go to. I told her I thought it could be done and I believed it could be done. Everything that I did in the preparation of the deeds and recording them was done by me in good faith, believing that it would carry out her wishes. My recollection is that I discussed with her the division of the property before Mr. Parmele went up there. It was my understanding that it was her intention to dispose of all of her property by the deeds and the will, to take effect at her death. The will was signed on the same day as the deeds. It is made out on a printed form, and the blanks filled in are in Mr. Parmele's handwriting. The deeds after being signed and acknowledged were delivered to me. At the time she delivered the deeds to me she made the remark that if I got a chance to sell anything at a profit to sell it and she would replace it. I think that is the word she used. She told me to record the deeds upon her death and I did so. The deeds were in my custody until her death. They were never back in her hands. Mrs. Fensky placed the deeds in my hands and I gave them to Mr. Parmele, who was in my employ, to take charge of them and put them away for me. I remember a conversation that I had with Mrs. Fensky, but don't know at what time, that she wanted to dispose of her property in

such a way that there would not be any trouble between her heirs after she died but I do not know just how that was brought out. It was one of the conversations I had with her when I was fixing the matter up for her.

I remember filing a verified answer to the complaint in the action of Farnsworth vs. Ferguson, in the Superior Court. In that answer referring to the deed of September 18, 1907, from Jeanette Fensky to Minnie S. Farnsworth I stated as follows: "Defendant admits that on or about the 18th day of September, 1907, the said Jeanette Fensky made and executed a certain writing to, and in favor of, plaintiff purporting to convey said property to plaintiff, but denies that said writing was made with the advice and assistance of defendant; or that it was a deed, or that it was duly executed; and that it was, by the said Jeanette Fensky, or by anyone in her behalf, or in any manner, or at all, delivered to said defendant with instructions to hold the same in his possession until the death of said Jeanette Fensky, and then deliver the same to plaintiff, but is informed and believes, and on his information and belief alleges the fact to be, that on or about the 18th day of September, 1907, said Jeanette Fensky was of unsound mind, and not of the mental capacity to convey property. That the said Jeanette Fensky received no consideration whatsoever from plaintiff or from anyone, for the execution of the said deed. The defendant admits that said writing was signed by said Jeanette Fensky, a certificate of acknowledgment of a notary public placed thereon, and the said writing was

given into his possession and recorded on the 10th day of July, 1908, in Book 3430 of Deeds, at page 142."

I evidently stated that, but I don't think it is just exactly as I meant it to appear.

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LETTERS OF ADMINISTRATION OF THE ESTATE OF FERDINAND FENSKY, deceased in the Superior Court of Los Angeles County, were offered and received in evidence as Plaintiffs' Exhibit 19. The same is dated October 20, 1903, and shows the appointment of Jeanette Fensky as administratrix of the estate of Ferdinand Fensky, deceased. Attached thereto is the oath of Jeanette Fensky as such administratrix in the form required by law, sworn to October 15, 1903.

Letters of administration with the will annexed in the estate of Jeanette Fensky in the Superior Court of Los Angeles County were offered and received in evidence as Plaintiffs' Exhibit 20. The same is dated August 14, 1908, and shows the appointment of J. H. Merriam as administrator with the will annexed. Attached thereto is the oath of J. H. Merriam as administrator with the will annexed in form required by law, sworn to August 14, 1908.

The inventory and appraisement in the matter of the estate of Jeanette Fensky, in the Superior Court of Los Angeles County, was offered and received in evidence as Plaintiffs' Exhibit 21. The same is as follows:

IN THE SUPERIOR COURT OF THE STATE  
OF CALIFORNIA,  
IN AND FOR THE COUNTY OF LOS ANGELES.

In the Matter of the Estate of )  
 )  
Jeanette Fensky, ) INVENTORY AND  
 )  
Deceased. ) APPRAISEMENT.

I, C. G. KEYES, County Clerk of the County of Los Angeles and ex-officio Clerk of the Superior Court thereof, do hereby certify that Ira J. H. Sykes J. L. Attebury and A. H. Todd, three duly qualified and disinterested persons, were duly appointed appraisers of the estate of said deceased, by order of said Superior Court, duly entered.

WITNESS my hand and the Seal of the said Superior Court, this 31st day of August 1909.

C. G. KEYES, Clerk.

By W. L. Warren, Deputy.

STATE OF CALIFORNIA, )  
County of Los Angeles ) ss.

Ira J. H. Sykes, and J. L. Attebury, duly appointed appraisers of the estate of Jeanette Fensky, deceased, being duly sworn, each for himself says that he will truly, honestly and impartially appraise the property of said estate which shall be exhibited to him, according to the best of his knowledge and ability.

SUBSCRIBED and sworn to be ) Ira J. H. Sykes  
fore me this 1st day of Sept. 1909. ) J. L. Attebury.  
ROBERT STRONG, )  
Notary Public. )



STATE OF CALIFORNIA )  
County of Los Angeles. ) ss.

J. H. MERRIAM, administrator with the will annexed of the Estate of Jeanette Fensky, deceased, being duly sworn, says that the annexed inventory contains a true statement of all the estate of the said deceased, which has come to the knowledge and possession of said administrator and particularly of all the money belonging to the said deceased, and of all just claims of the said deceased, against the said administrator.

SUBSCRIBED and Sworn to be- ) J. H. MERRIAM  
 )  
fore me, this 8th day of Sept. 1909. )

C. G. KEYES, Clerk.

By C. O. Winters, Deputy.

ESTATE OF Jeanette Fensky, DECEASED:

To Ira J. H. Sykes and J. L. Attebury Appraisers, Dr.

To compensation for services in appraising said estate –  
items as follows: One days, service at \$5.00

per day each,	\$10.00
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Necessary disbursements as follows: Notary

fees,	1.00
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STATE OF CALIFORNIA, )  
County of Los Angeles. ) ss.

Ira J. H. Sykes and J. L. Attebury, the appraisers above named, being duly sworn, each for himself says that the foregoing bill of items is correct and just and

that the services have been duly rendered as therein set forth.

Ira J. H. Sykes

J. L. Attebury.

SUBSCRIBED and sworn to before me, this 1st day of Sept. 1909.

~~G. G. KEYES, Clerk.~~

By Robert Strong, ~~Deputy.~~

Notary Public.

(SEAL)

Moneys belonging to said deceased, which have come to the hands of the	\$2324.38
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Claim for rent collected on San Pedro property by Mrs. Katzung prior to Mrs. Fensky's death to the amount of \$135.00	135.
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Note of Don Ferguson and Ona U. Ferguson for \$1050.00 dated Aug. 2, 1909 - payable on or before Sept. 15/1909 to the estate of Jeanette Fensky, decd.	1050.
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Claim for pension for small amount (not over \$7.50) on pension cart. issued a few weeks before her death, less Attorney's fee	-----
--	-------

TOTAL	3509.38
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The whole of the estate mentioned in the foregoing inventory is separate property deceased being a widow.

We, the undersigned, duly appointed appraisers of the estate of Jeanette Fensky, deceased, hereby certify that the property mentioned in the foregoing inventory has been exhibited to us, and that we appraise the same

at the sum of Three thousand five hundred and nine & 38/100 dollars (\$3509.38)

Dated Sept. 1st, 1909.

Ira J. H. Sykes, Appraiser.

J. L. Attebury, Appraiser.

Appraiser.

FILED Sep. 8, 1909. C. G. KEYES, Clerk.

By C. O. Winters, Deputy.

A copy of the said inventory and appraisement is annexed as an exhibit to the amended answer of J. H. Merriam, and to the amended answer of Eugene Wellke, et al., on file in and a part of the record of this action.

The plaintiffs offered in evidence eight assignments or quit-claim deeds from the persons hereinafter named to Jeanette Fensky. The same were dated as hereinafter set forth, were all duly acknowledged and were all recorded April 3, 1905, in the office of the County Recorder of the County of Los Angeles, in books of Deeds and at the pages mentioned. The same were received in evidence and marked Plaintiffs' Exhibits 22 to 29, inclusive, respectively, as follows:

Exhibit 22, from Hulda Richter, an insane person, sister and heir at law of Ferdinand Fensky, deceased, by F. C. Richter, her guardian, dated October 24, 1904, Book 2276, page 12, as follows:

IN THE SUPERIOR COURT OF THE COUNTY  
OF ALAMEDA, STATE OF CALIFORNIA.

In the Matter of the Es- )  
tate of Hulda Richter, an ) Letters of Guardianship.  
insane person, )

State of California, County of Alameda, ) ss.

F. C. Richter is hereby appointed guardian of the person and estate of Hulda Richter, an insane person.

WITNESS John P. Cook, Clerk of the Superior Court of the County of Alameda with the seal of said Court affixed this 16 day of Sept., A. D. 1904.

(SEAL) By Order of the Court,  
John P. Cook, Clerk,  
By Chas. A. Gale, Deputy Clerk.

State of California, County of Alameda, ) ss.

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully perform the duties of my office as Guardian of the person and estate of Hulda Richter (an insane person) according to law.

F. C. Richter.

Subscribed and sworn to before me this 16th day of September, A. D. 1904.

(SEAL) C. L. Colvin, Notary Public

Endorsed Filed Sept. 16, John P. Cook, County Clerk,  
1904,

By Chas. A. Gale, Deputy Clerk.

State of California, County of Alameda, ) ss.

I, John P. Cook, County Clerk of the County of Alameda, and officio Clerk of the Superior Court, do



hereby certify the foregoing to be a full, true and correct copy of the Letters of Guardianship in the Matter of the Estate and Guardianship of Hulda Richter, an insane person, now on file and of record in my office and I further certify that the same have not been revoked or vacated.

WITNESS my hand and the seal of said Court this 7th day of November, A. D. 1904.

(Superior Court Seal)      John P. Cook, Clerk,

By Martin J. Hanley, Deputy Clerk.

#### ASSIGNMENT.

This Indenture made this 24th day of October, 1904, by between Hulda Richter (an insane person) sister heir-at-law of Ferdinand Fensky, deceased, now living at the City of West Berkeley, California, by and through her duly & legally appointed guardian F. C. Richter, party of the first part and Jeanette Fensky, widow, of the late Ferdinand Fensky, deceased, now living at the City of San Pedro, California, party of the second part,

WITNESSETH: That said party of the first part by virtue of an order to that effect made by the Superior Court of Alameda County, California, in the Matter of the guardianship of said Hulda Richter, an insane person & in consideration of the sum of \$1000.00 lawful money of the United States of American, to said guardian in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, has assigned, remised, released & forever quitclaimed & as such guardian by these present doth assign, remise, re-

lease & quitclaim unto the said party of second part & to her heirs & assigns forever all the right, title & interest of said Hulda Richter in & to the real & personal property wherever located (as sister & heir-at-law) of said Ferdinand Fensky, deceased, TO HAVE AND TO HOLD the same unto the said party of the second part & to her heirs and assigns forever, the purpose herein being to sell, transfer & assign to said Jeanette Fensky all the right, title & interest of said Hulda Richter in & to the estate of Ferdinand Fensky, deceased.

IN WITNESS WHEREOF, the said party of the first part by & through her said guardian as aforesaid & by & with the approval of said Probate Court has hereunto set her & his hand & seal the day & year first above written:

Hulda Richter,

by her guardian F. C. Richter.

The within deed & assignment is approved by me this 24th day of October, 1904.

S. P. Hall, Judge of Superior Court.

State of California, County of Alameda, ) ss.

On this 24th day of October, 1904, before me, C. L. Colvin, a Notary Public in & for said County, residing therein, duly commissioned & sworn, personally appeared F. C. Richter, guardian of Hulda Richter, an insane person known to me to be the person whose name is subscribed as guardian of said Hulda Richter to the within instrument of writing & acknowledged to me that he executed the same as such guardian.

WITNESS my hand & official seal the day and year first above written.

(Notarial Seal) C. L. Colvin, Notary Public.  
in and for the County of Alameda, State of California.  
#137-A full, true and correct copy of original recorded  
at request of Grantee, Apr. 3, 1905 at 36 min. past 2  
P. M.

Calvin Hartwell, County Recorder by A. Smith,  
Deputy.

STATE OF CALIFORNIA, )  
: ss.  
County of Los Angeles. )

I hereby certify the foregoing to be a full, true and correct copy of the instrument appearing recorded in Book No. 2276 of Deeds Page 12 Records of Los Angeles County, and that I have carefully compared the same with the original record.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, this 17th day of December, 1917.

C. L. LOGAN, COUNTY RECORDER,  
(Seal) By F. Levy, Deputy.

Exhibit 23, from Louise Pickens, sister and heir at law of Ferdinand Fensky, deceased, dated July 29, 1904, Book 2269, page 97.

Exhibit 24, from George Fensky, nephew and heir at law of Ferdinand Fensky, deceased, dated July —, 1904, Book 2251, page 288.

Exhibit 25, from Frederick Fensky, brother and heir at law of Ferdinand Fensky, deceased, dated March 13, 1905, Book 2254, page 288.

Exhibit 26, from Charles Fensky, brother and heir at law of Ferdinand Fensky, deceased, dated July 25, 1904, Book 2269, page 95.

Exhibit 27, from Johanna Schutt, sister and heir at law of Ferdinand Fensky, deceased, dated August 3, 1904, Book 2269, page 96.

Exhibit 28, from Ida Wendt, sister and heir at law of Ferdinand Fensky, deceased, dated December 20, 1904, Book 2261, page 247.

Exhibit 29, from Augusta Krauss, sister and heir at law of Ferdinand Fensky, deceased, dated July 30, 1904, Book 2269, page 98.

The instruments, except the Richter deed, were all similar in form to the instrument signed by Louise Pickens, which reads as follows:

ASSIGNMENT. THIS INDENTURE, made this 29<sup>th</sup> day of July, 1904, by and between MRS. LOUISE PICKENS, sister and heir at law of FERDINAND FENSKY, deceased, now living at the City of Topeka, Kansas, party of the first part, and JEANETTE FENSKY, widow, of the late FERDINAND FENSKY, deceased, living at the City of San Pedro, State of California, party of the second part,

WITNESSETH: That said party of the first part, for and in consideration of the sum of \$1000. lawful money of the United States of America, to her in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged has assigned, remised, released and forever quit-claimed, and by these presents doth ASSIGN, REMISE, RELEASE and forever QUIT-CLAIM unto the said party of the second part



(Testimony of Minnie S. Farnsworth.)

and to her heirs and assigns, all of her right, title and interest in and to the real and personal property, wherever located of FERDINAND FENSKY, deceased, TO HAVE AND TO HOLD, the same unto the said party of the second part and to her heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set her hand and seal the day and year first above written.

Louise Pickens.

(Acknowledged)

MINNIE S. W. FARNSWORTH,

one of the defendants, called as a witness on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

I am one of the defendants in this action. I am the daughter of Eugene Wellke, another defendant. During the latter part of the lifetime of Mrs. Jeanette Fensky I resided with her, attended to her correspondence, writing letters at her request and under her direction signed her name to letters. Prior to residing in Los Angeles County, I resided with Mrs. Fensky in Topeka, Kansas. I am acquainted with M. T. Campbell, an attorney of that city, and know his writing.

Q I will show you these papers, Mrs. Farnsworth, consisting of five sheets and ask you if the portion written with ink, and one page written in indelible pencil, are in your handwriting (showing)?

(Testimony of Minnie S. Farnsworth.)

A This is mine (indicating), this is mine (indicating), this is mine here, down to here (indicating).

Q I am referring to the part now written in ink, not referring to the portion written with a lead pencil.

A I would say it is.

Q All in your handwriting?

A I would say so.

Q Now, can you tell me in whose handwriting the portions of the document are that are written in lead pencil? Are they in the handwriting of M. T. Campbell?

A I don't understand why this was put in between here (indicating).

Q I will see in just a moment. Answer the question.

A Just at a glance of them I should say they are in Mr. Campbell's handwriting.

Q That is, the lead pencil portions?

A Yes.

Q Now, referring to the portions of this document that appear to be in ink and indelible pencil which you say you wrote, you wrote that at Mrs. Fensky's direction, did you not?

A I would say so, yes.

Q Well, that is a fact, isn't it?

A Yes.

MR. WILSON: We offer this paper in evidence. \* \* \*

MR. EDWARDS: We will object to the pages marked at the top in pencil, two, three and four, on the ground that they are incompetent, irrelevant and immaterial. There is no proper foundation laid show-

(Testimony of Minnie S. Farnsworth.)

ing that those pages were ever transmitted to anyone— to any of the plaintiffs, and none of the defendants can be bound by them; and there is no proper showing that the pencil notations appearing on the letters are in the handwriting of Mr. Campbell, or that they were transmitted to Mrs. Fensky or Mrs. Fensky ever was apprised of the portions appearing in pencil. The first two letters, page one and page two, I have no objection to.

Q BY THE COURT: Well, how did you come to write these letters that you wrote—the portions that you wrote?

A At my aunt's direction.

Q Did she tell you what to say?

A Yes.

Q After you wrote it, did you read it over to her?

A Yes.

Q Then what did you do with it?

A Why, I put it in an envelope and sent it on.

Q Sent it where?

A Sent it on.

Q To whom?

A Sent addressed to Mr. Campbell?

MR. WILSON: Yes. \* \* \*

Q I asked you if the page here—the second one in this series, written in indelible pencil, which you are now looking at, was written in your handwriting?

A This is my handwriting.

Q And written to Frederick Fensky at the request of your aunt, Mrs. Jeanette Fensky, was it not?

(Testimony of Minnie S. Farnsworth.)

A Yes. \* \* \*

Q Now, look at the three pages following, that are written mostly in ink, and are headed at the top in lead pencil, "2, 3" and "4", respectively, and state whether you wrote the portion of those pages that appear in ink?

A I wrote this appearing in ink, but to whom, it doesn't say.

Q No, but you did write it?

A I should say so.

Q And you wrote it at the direction of your aunt, Mrs. Jeanette Fensky?

A I would think so \* \* \*

Q I call your attention to the first page addressed to "M. T. Campbell, Topeka, Kansas, Dear Sir: Within you will find a letter from, and also one to Frederick. If you approve of it, send it to him. Put in in the mail car so he cannot see that it started from there. If you don't approve of it or part of it, send it back to me and write in the place what I shall write to him."

Now, with that in mind, look at those last three sheets again, and I will ask you if those three sheets were not written by you at the dictation and direction of Mrs. Fensky. \* \* \*

A Yes. \* \* \*

Q BY THE COURT: Well, have you any recollection of writing these papers for your aunt?

A Yes.

Q Well, now, what did you write? Did you write all these sheets that are in here in ink?



(Testimony of Minnie S. Farnsworth.)

A Yes; I have said that I have written them.

Q All of those that are in ink?

A Yes.

Q And do you know what you did with them after you wrote them?

A Well, those that I wrote at that time I enclosed them and sent them to Mr. Campbell, but whether these are the very pages, or not, that is what I don't know.

Q Well, couldn't you tell by looking at them?

A I think so, yes. \* \* \*

Q Just read it, Mrs. Farnsworth, and then we will know what we are asking you about.

A (Reading sheets to herself). I don't see the end of the letter.

Q You have read it all now, have you, Mrs. Farnsworth.

A Yes.

Q Well, now, can you state now that the portion written in ink was sent by you to Mr. Campbell with the letter to him, addressed to him, dated February 23, 1905?

A Yes.

Q And you enclosed also with that letter, did you not, the letter dated February 23, 1905, addressed to Mr. Frederick Fensky, Leavenworth, Kansas, a portion being written in indelible pencil and a portion in lead pencil?

A As I remember, he suggested that he do that, didn't he? "Within you will find a letter from, and also one to Frederick." Well, that is those, isn't it?

(Testimony of Minnie S. Farnsworth.)

Q Yes. Well, all right. Now, the three sheets that you have referred to, you enclosed with this same letter, did you not?

A Yes.

Q For Mr. Campbell's perusal and direction?

A Yes.

THE COURT: This last sheet seems to bear the name "Frederick Fensky" on the back of it there.

MR. WILSON: Yes; I was going to call her attention to that.

Q Referring now to the paper the same width as the letter paper, but about two inches and a half in width in the other direction, you notice these words: "Box 1804, San Pedro, Calif., Feb. 23rd, 1905. Mr. Frederick Fensky, Leavenworth, Kansas." That is in your handwriting also, isn't it?

A Yes.

Q Now, on the reverse side of this short piece of paper appear these words: "And I know Ferdinand worked hard enough for all he got," and then a line clear across the page, and then underneath the line, "plain to you that I have made you a liberal offer for your interest when I take all the risk of getting it back." That is also in your handwriting?

A It is, but I would like to know where the balance of the sheet is, and I would like to know where the first page is. \* \* \*

MR. EDWARDS: We object to the offer of this document, one of the grounds being the special objection to the parts in pencil. There is no showing that

(Testimony of Minnie S. Farnsworth.)

the portions of the letter contained in pencil were ever seen by Mrs. Fensky, or that she ever had any knowledge of the contents of them, or that they would binding upon any of the defendants in this action, or that they were ever communicated to Mrs. Fensky or any of the present defendants, or their predecessors in interest. And further objection that it appears that the documents as offered is an incomplete letter. The portion that your Honor called the attention of counsel to, which contains the name "Mr. Frederick Fensky," apparently is the top portion of the first page of the letter, and the balance of the page is missing; and it seems rather unfair to introduce fragments of a document in this shape, without knowing what is in the rest of the document. It is produced by the plaintiff. \* \* \*

Q BY THE COURT: Did you ever get these back? Did your aunt ever get them back, to your knowledge?

A That letter there was sent back, with Mr. Campbell's corrections.

Q Which letter are you talking about?

A The one lying there (indicating).

MR. WILSON: The three sheets?

A Yes; but it isn't the whole letter.

Q BY THE COURT: What part of it is missing?

A Well, it is numbered page 2, there. I don't see page one.

Q BY MR. WILSON: Don't you know, Mrs. Farnsworth, that Mr. Campbell cut out a portion of that letter?

A I don't know.

(Testimony of Minnie S. Farnsworth.)

Q And suggested that it be not sent?

A I don't know.

Q BY THE COURT: Well, what was done with them when you got it back?

A Why, we wrote it as he suggested.

Q BY MR. WILSON: And forwarded it to Frederick Fensky, did you?

A I think so, yes.

Q You copied those sheets-- the letter as corrected by Mr. Campbell, omitting the portions that he had crossed out or cut out, and inserting the portions that he had inserted, and forwarded the letter as completed to Frederick Fensky, did you?

A According to Mrs. Fensky's directions.

Q Well, you did that thing at her direction?

A Yes.

MR. EDWARDS: The further objection on the ground that Ferdinand Fensky is not a party claimant in this action. Any communication to him would be irrelevant and immaterial to any issues of this case.

THE COURT: Overruled. It is offered, I suppose, as statements tending to show conspiracy of admissions on the part of the deceased with respect to the state of value of the husband's estate. It is not very persuasive, due to the fragmentary condition in which it was found, but I am giving it the consideration that it seems to be entitled to.

The portions of the original exhibit written in ink are here printed in ordinary type; the portions of the original written in lead pencil are printed in capital let-



ters; the portion of the original written in ink and crossed out with lead pencil are printed in ordinary type with a line drawn through the same. The said Exhibit 30 is as follows:

— 2 —

Now about the estate affairs; Ferdinand never did make a will; He did not believe in wills. He had bought blank deeds and wrote out one in my name IN WHICH HE INTENDED TO GIVE ALL TO ME AND which I have, if you care to see it; then he got a stroke of paralysis in his right hand; then he spoke of getting a lawyer to do it which I did not care to do when Ferdinand was so sick and I was all worn out too. But now I wish I had; I would not have this trouble then; and then I wanted to give you all something and little did I think of any of you making me any trouble. When you speak of your side feeling sore over the settlement I don't think it can be for they all wrote me nice letters thanking me for what they received. There is all-ways two sides to everything however; and you know that there is not one of your side who ever turned over one hand to help us make anything. I KNOW THAT THE \$1000 I PAID EACH OF THE OTHERS IS A FAIR PRICE FOR THEIR INTEREST IN THE ESTATE WHEN WE CONSIDER THE BAD & DOUBTFUL DEBTS LEFT TO BE COLLECTED, THE EXPENSES OF ADMINISTRATION & ALL THE RISKS I MUST RUN TO COME OUT EVEN, & I HOPE YOU WILL NOT BE THE CAUSE OF INCREASING THAT EXPENSE WHICH NOW ONLY YOU &

I ARE INTERESTED IN. I THINK MR. CAMPBELL WILL DO HIS DUTY AS ADMINISTRATOR BUT OF COURSE YOU KNOW THAT HE CAN AFFORD TO HAVE CONTESTS & LAWSUITS IN COURT & THUS INCREASE HIS PAY AS ADMR. WHEN WE CANNOT. IF YOU SHOULD SELL OUT TO ME AS THE OTHERS HAVE DONE, I WOULD UNDERTAKE TO MEET ALL CLAIMS AGAINST THE ESTATE & SOON HAVE THE KANSAS ADM. DISCHARGED & THEN TAKE MY TIME TO FINALLY CLOSE UP THE ESTATE IN OUR COURT HERE.

— 3 —

About tax-deeds: We only held one tax-deed and that was on Mrs. Sachse's property from which we drew the rent and made ourselves paid, therefore I gave a quitclaim deed and did not receive a cent therefor as Ferdinand had told me to do so.

Now about the Personal property in Calif. He did not leave any in his name except four hundred dollars which we have listed in the courts. °

Now about the large residence you mention which you seem to think is rented for fifty dollars a month, and which you seem to feel sore about because the court gave it to me; It was not finished at the time Ferdinand passed away so I deprived myself of all the comfort,

— 4 —

kept the kitchen and slept in it and rented all the rest to get some rent to pay for finishing up the house and

didn't get near the rent that you mention but would like to know where you get all this foolish information from.

About the ten thousand dollars income a year, it is not true and I would like for your informant to let me know, as I would like to get part of it; as I have deprived myself of the comforts which the Lord knows I should be entitled too, as I certainly have worked hard enough for them and I know Ferdinand worked hard enough for all he got. The court has given me the residence and allows me fifty dollars a month as long as the estate is not settled. Also I am entitled to my administratrix fees in Calif. and my attorney here. Now please figure what will be left. Yes and there is the burial-expenses, court-expenses, Doctors-expenses and others. Now I hope I have made it plain to you THAT I HAVE MADE YOU A LIBERAL OFFER FOR YOUR INTEREST, WHEN I TAKE ALL THE RISK OF GETTING IT BACK. LET ME HEAR FROM YOU AGAIN AS SOON AS CONVENIENT. Yrs.

— 3° —

NOW ABOUT THE ADDITION: MUCH OF THIS PROPERTY WAS DEEDED AWAY BEFORE FERDINAND PASSED AWAY, BUT ALL NOT SO DEEDED STILL BELONGED TO HIM WHEN HE DIED & DESCENDED, AS ALL HIS OTHER KANSAS REAL ESTATE, TO ME & TO ME ALONE. AND I DON'T SEE WHY YOU SHOULD THINK THERE WAS ANY DIFFERENCE BETWEEN THE ADDITION REAL ES-

TATE & THE REST OF THE REAL ESTATE THAT DESCENDS TO ME. MUCH OF THE REAL ESTATE WAS MINE ANYHOW, BUT WHETHER I OWNED ANY OR NOT, I UNDERSTAND THAT ALL HE OWNED AT HIS DEATH CAME TO ME UNDER THE KANSAS LAW AS HIS SOLE HEIR AT LAW.

(Now about the addition: in the spring before Ferdinand passed away he and I had given deeds to nearly all the people who held contracts except two or three who forfeited.)

On one side of the small paper is the following:

Box 1804 San Pedro, Calif. Feb. 23rd, 1905.

Mr. Frederick Fensky,

Leavenworth, Kansas.

On the reverse side of the small paper is the following: and I know Ferdinand worked hard enough for all he got.

---

plain to you that I have made you a liberal offer for your interest, when I take all the risk of getting it back.

The letter addressed to M. T. Campbell and signed "Mrs. F. Fensky" was offered and received in evidence as Plaintiffs' Exhibit 31, and is as follows:

Box 1804 San Pedro, Calif. Feb. 23rd, 1905.

M. T. Campbell

Topeka, Kansas.

Dear Sir:

Within you will find a letter from, and also one to Frederick. If you approve of it send it to him. Put



it in the mail car so he cannot see that it started from there. If you don't approve of it or part of it send it back to me and write in the place what I shall write to him.

Now about the Paramore place. I will not take less than twenty-seven hundred dollars for it; unless I get it all cash; in that case I will take twenty-five hundred. You may rent it for fifteen dollars per month.

About the Wellke ten acres; I have written to Mr. Bridge. I believe this is all for the present time.

Very Respectfully yours, Mrs. F. Fensky.

The letter addressed "Mr. Frederick Fensky, Leavenworth, Kansas" and signed "Mrs. F. Fensky" was offered and received in evidence as Plaintiffs' Exhibit 32, and is as follows:

(1)

Box 1804 - San Pedro, Calif. Feb. 23rd, 1905.

Mr. Frederick Fensky,

Leavenworth, Kansas.

Dear Brother:

Yours of the 15th rec'd in due time. I am very  
and  
sorry to hear that you and Addie are sick ~~but~~ hope when  
this reaches you it will find you well. Within you will  
find the notice of your dear sister in Germany having  
past away. ~~The~~ It is very sad indeed for the son to  
be left alone ~~among strangers~~ without relatives.

When you write please tell me how your wife is getting along and how Bain is doing. We are all quite well. I wish you you were all in Calif. so as to be able to enjoy some of this delightful climate instead of being

(Testimony of Minnie S. Farnsworth.)

there where you nearly freeze to death. With best regards to yourself and wife and children I will close,

Very respectfully yours,

Mrs. F. Fensky.

(Witness continuing):

In October, 1907, I was given access to the bank account of Mrs. Jeanette Fensky in the National Bank of Pasadena. Mrs. Fensky died July 9th, 1908. For several days prior to that time she was not able to transact any business. July 6, 1908, I drew from her account in the Pasadena National Bank \$2819.73. That the check for that amount closed her account in the bank. On the same day I opened an account in my own name, "Minnie S. W. Farnsworth, Special", and deposited the said amount in that account. I continued checking money from that account until two weeks or more after Mrs. Fensky's death. I paid nurses and doctors and other bills. July 21, 1908, I drew a check for \$125 as a retainer fee for J. H. Merriam, and also a check for \$2324.38, representing almost the entire balance which was deposited the same day in the account of J. H. Merriam, Administrator. The deposit made in Mrs. Fensky's account, May 29, 1908, of \$2700., shown on Plaintiffs' Exhibit 12, was a remittance from Mr. Campbell in Kansas. It represented the proceeds of the Rost mortgage.

Mr. and Mrs. Fensky had no children.

Just after Mrs. Fensky's death I attended several meetings at Mr. Merriam's office at which Mrs. Fensky's property was discussed.

(Testimony of Minnie S. Farnsworth.)

Mr. Merriam, Mrs. Schmidt, Mrs. Katzung, my father and mother, Mr. and Mrs. Wellke, Corrine Loveland and Laura Coughlin were present, also Mr. Thompson.

At these meetings we did not at any time discuss the deeds that Mrs. Fensky had made prior to her death and did not discuss whether any of those deeds were recorded or not. I remember testifying in the case of Ferguson against Farnsworth, tried in the Superior Court on November 4, 1910.

Mr. Wilson: This is a transcript of the evidence given by you. (Reading)

"Q You are the plaintiff—one of the plaintiffs in this case?

"A Yes, sir.

"Q And you are the daughter of Mr. Wellke, the other plaintiff?

"A Yes, sir.

"Q Will you state to the court what, if any, negotiations were had between you and the others to whom Mrs. Fensky deeded the property, in these deeds that have been testified to, and which you have described in your amended complaint, with regard to the validity of the deeds or with regard to accepting the deeds and consenting to the validity of the deeds? What, if any, negotiations took place between the parties?

"A Well, the parties all agreed to accept the pieces and they each took care of their own property up until the time of our trial.

(Testimony of Minnie S. Farnsworth.)

"Q BY THE COURT: What I want is, was there any agreement before Mrs. Fensky's death? These deeds were made before Mrs. Fensky's death?

"A Yes.

"Q There was a deed made by your father, a deed to Mrs. Schmidt, a deed to Mrs. Katzung, and a deed to you?

"A Several deeds made to the other parties.

"Q Did you have any agreement with them prior to Mrs. Fensky's death in regard to those deeds.

"A No, we had no agreement prior to her death.

"Q When did you have any agreement.

"A Well, after her death we all treated these different properties as our property, from the fact that they were deeded to us.

"Q BY MR. MERRIAM: As a matter of fact, you didn't know what property had been deeded before her death?

"A No, not altogether. We knew of some of the places.

"Q But the deeds were left with Mr. Ferguson and he recorded them after her death?

"A Yes, the day after her death.

"Q Then you knew what distribution had been made?

"A Yes.

"Q And it was after that -- after the death and after the recording of the deeds that this agreement was made between the parties?

"A Yes.

"Q And it was after that that each party took posses-



(Testimony of Minnie S. Farnsworth.)

sion of the property that had been deeded to them?

"A Yes.

"Q With the consent of all the rest?

"A Yes.

"Q Was there any question at that time with regard to the validity of the deed? Did any of the parties know anything about the question in regard to the delivery of the deeds? Did Mr. Ferguson tell you or tell any of the others, so far as you know, with regard to this question about the delivery of the deeds?

"A Oh, we supposed at that time --

"THE COURT: Never mind. Had the question ever arisen about the delivery of the deeds?

"A Not until that time.

"Q BY MR. MERRIAM: Had there been any question in regard to the validity of the deeds, in any way?

"A Not up to that time."

Q BY MR. WILSON: Did you so testify?

A Whatever is there, I suppose I testified to.

MR. WILSON: (again reading from transcript).

"Q Were those the only conversations you had on that question as to whether there should be any objection made to the deeds or to the distribution, or as to whether anyone should raise the question of the validity?

"A Well, the first question of validity was raised in regard to the other side -- the Fensky heirs, and then later on the question of validity was raised in regard to my father. He didn't feel he had received his third.

(Testimony of Minnie S. Farnsworth.)

"Q Where was the conversation between the parties or representatives of the parties in regard to that?

"A Well, the conversation at your office was that we agreed to let the deeds stand.

"Q Who was there at Mr. Merriam's office?

"A The representative of Amanda Katzung.

"Q Who was it?

"A William Thompson, and the representative of Aunt Alma Schmidt and Cousin Henry Schmidt.

"Q Who is that?

"A Henry Schmidt.

"Q Who else was there?

"A My father.

"Q And yourself?

"A Yes, sir.

"Q And Mr. Merriam?

"A Yes, sir.

"Q Anybody else?

"A I don't recall anybody else now.

"Q Neither Mrs. Katzung nor Mrs. Schmidt were there present?

"A Mrs. Schmidt may have been there. She was there part of the time. Mrs. Katzung never did come in during our conference.

"Q How did you happen to be there?

"A Judge Merriam called us there in conference."

BY MR. WILSON: I'll ask you if you so testified?

A Whatever is there I testified to.

Q BY MR. WILSON: All right. Now, when you

(Testimony of Minnie S. Farnsworth.)

testified at the trial, no question had been raised up to that time --

A Not in Judge Merriam's office.

Q Now, the question was raised as to the validity of those deeds, wasn't it?

A Not as to the validity.

Q As to the delivery of the deeds, then; isn't that a fact?

A Well, I don't recall -- neither one was raised in Judge Merriam's office up to that time.

Q Now, you testified in 1910; that was nine years ago.  
MR. EDWARDS: I object to that. The evidence does not show that she testified as to the validity of the deeds being raised at that time.

Q BY MR. WILSON: The question was asked: "Had there been any question in regard to the validity of the deeds in any way?" And you answered, "Not up to that time." Now, then, there was a question raised at some time, was there not?

A I heard rumors outside of Judge Merriam's office.

Q What did you mean when you testified then at that trial, that this meeting was held in Judge Merriam's office, and detailing all those people present that you just now told me were present at that conference?

A Well, you see, the words "validity" and "delivery", I get them mixed up. \* \* \*

Q \* \* \* Now, then if there was a conversation there, as you testified, in 1910, tell us what the conversation was concerning the validity or the delivery of the deeds. I don't care which word you refer to.

(Testimony of Minnie S. Farnsworth.)

A I don't recall it at all.

Q You don't recall it?

A We went there and we were ready to proceed with getting the matter straightened up and each agreed to accept what aunt Jennie had given them, and my father had previously sort of murmured because he thought he didn't receive his portion, as much as aunt Alma Schmidt and aunt Amanda, but he finally decided that he would just let it stand as aunt Jennie Fensky had left it.

#### CROSS EXAMINATION.

Q BY MR. EDWARDS: Do you recall whether at any time you were in Judge Merriam's office that any question was raised as to whether or not the deeds were valid deeds or had been properly delivered?

A I don't recall.

Q You always participated, did you not, in the discussions?

A Yes.

Q The discussions with regard to the deeds grew out of the dissatisfaction of your father -- that he had been discriminated against?

A Yes.

#### JOHN DAVIS,

a witness called on behalf of the plaintiffs, testified as follows:

I am acquainted with the sixty acre tract of land formerly owned by Ferdinand Fensky and described as the southwest quarter of the southeast quarter and the south half of the northwest quarter of the southeast



(Testimony of John Davis.)

quarter of section 4, township 5 south, range 10 west, now in Orange County, formerly in Los Angeles County. I farmed it five years before I bought it. I bought the south thirty acres from Mr. Fensky two or three months before his death. I had a contract, but have not been able to find it.

Q BY MR. WILSON: What did you pay for that land, Mr. Davis?

MR. EDWARDS: Objected to as incompetent, irrelevant and immaterial. The purpose, I understand is to establish the value of the property at a set time.

THE COURT: Well, it is a circumstance; overruled.

I paid \$1700 for it. I paid \$50 to Mr. Fensky the day I bought it. The remainder of the purchase price I paid to Mrs. Fensky or her agent after Mr. Fensky's death. My son-in-law and I bought ten acres adjoining mine on the north two years after I bought the first tract. We paid \$100 an acre. We bought from Mrs. Fensky.

H. W. HEAD,

a witness called on behalf of the plaintiffs, testified as follows:

For the last thirty years I have been acquainted with the sixty acre tract of land formerly owned by Ferdinand Fensky which has just been referred to in Mr. Davis' testimony. I own property in the same section and have bought and sold property in and about that locality. In October, 1903, the reasonable market value of that land was from forty to fifty dollars per acre.

(Testimony of H. W. Head.)

CROSS EXAMINATION.

BY MR. EDWARDS:

Q Doctor, when was it the Pacific Electric Railway came into this district?

A 1905.

Q That increased considerably the value of properties down in that district?

A It went right up like a sky-rocket.

MR. EDWARDS: That is all.

J. H. MERRIAM,

one of the defendants, called as a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION.

No funds from the so-called Webster mortgage came into my hands while I was handling the estate, either as representative of the estate or as representative of any of the defendants. Every dollar that came into my hands as the administrator of the estate was deposited in that account and paid out by check. The record is complete on that.

Referring to the note signed by Mr. Stein in Kansas, my recollection is that Mr. Campbell came out from Kansas just a day or two before the petition for appointment as administrator with the will annexed here was heard. I don't remember the exact date, and I don't remember very much about the circumstances, but my recollection is that he brought a check from someone that had been made out, and was among those things that had been given at that consultation with

(Testimony of J. H. Merriam.)

Mr. Campbell that we decided were gifts causa mortis, and that in accordance with the instructions given in that written letter by Mrs. Fensky, that was turned over to Mrs. Schmidt and Mrs. Katzung.

It is my recollection that the letter which I now produce is the letter that I acted upon in dividing the proceeds of the Stein note between Mrs. Katzung and Mrs. Schmidt. This doesn't seem to be the original letter. I found it among my files and it is the only letter I have. What we acted upon was a letter that had been signed by Mrs. Fensky. When I say that we decided it was a gift causa mortis, I mean that Mr. Campbell and I so decided. Mr. Campbell was named in the will as executor. He was familiar with her business and came out here. My recollection is that he brought this draft from Mr. Stein out with him and that that matter and several other matters – that they were an attempt to make a gift causa mortis, and that we decided that that was the intention, and that it should be carried out.

At the same time Mr. Campbell brought the draft to pay off the Stein note, he paid a note of his own that Mrs. Fensky had held. This had been dealt with in the same way with a similar letter. The unpaid portion of the note then amounted to \$1000.00. Mr. Campbell paid Mrs. Farnsworth \$100 and Miss Loveland \$100 and gave each a note for \$400.

I have now found what seems to be an original of the letters previously referred to.

The same were offered and received in evidence as Plaintiffs' Exhibits 36 and 37 respectively as follows:

Exhibit 36

No. 581 – N. Raymond Ave. Pasadena, Calif. Oct. 10th, 1907.

Mr. and Mrs. W. C. Stein – No. 1029 – Lane St., Topeka, Kansas.

Dear Friends:

I have been sick all summer. In case I should not get well – and pass on – I want the note of one thousand dollars you owe me to be paid to my two sisters, Amanda Katzung, No. 450 Lincoln Ave. this city and Alma J. Schmidt No. 809 Locust St. this city to be divided equally. Minnie Farnsworth to hold note. Principal and interest to be paid through her.

This letter is written and signed in duplicate so that each hold one.

Sincerely yours, Jeanette Fensky.

Exhibit 37.

No. 581 – N. Raymond Ave. Pasadena, Calif.

October 10th, 1907.

Mr. Campbell – No. 531 Kansas Ave.,

Topeka, Kansas.

I have been sick all summer. In case I should not get well – and pass on – I want the note of one thousand dollars you owe me to go to my two nieces Minnie Farnsworth and Corinne Loveland (who are with me) to be divided equally between them.

Minnie to hold note. Corinne's share of principal and interest to be paid through Minnie.

(Testimony of J. H. Merriam.)

This letter is written and signed in duplicate so that each hold one.

Sincerely yours, Jeanette Fensky.

(Witness continuing) I have read the letter marked Exhibit 103 appearing in the depositions on file, the same being a letter from Mr. Campbell to Mrs. Farnsworth. I had that letter and answered Mr. Campbell two or three weeks before he paid me this money. I answered Mr. Campbell's letter July 24, 1908. The letter which you now show me is my reply to Mr. Campbell's letter.

I think it appeared as stated in the letter -- that it must have appeared at that time, that not only was the letter written, which you have, but also the possession of the note was turned over to Mrs. Farnsworth. That seems to be shown at that time, and I presume that is one reason why we concluded that it was a valid gift causa mortis; and it seems also that the heirs did not question the validity of it at that time -- did not wish to question the validity of it at that time. They acted on both of those things.

The said letter was offered and received in evidence as Plaintiffs' Exhibit 38, as follows:

J. H. Merriam

Attorney and Counsellor at Law

Union Savings Bank Building.

Pasadena, Calif. July 24, 1908.

Mr. M. T. Campbell, Esq.,

525 Kansas Ave.,

Topeka, Kansas.

Dear Sir:

Your letter of the 15th inst. to Mrs. Minnie Farnsworth has been referred to me to answer as the heirs



have united in asking me to represent the interest of all. Mrs. Farnsworth informs me that your note was turned over to her before Mrs. Fensky's death, and the heirs do not question the effectiveness of the effort to make a gift in contemplation of death, of this note to Mrs. Farnsworth and Corrine Loveland, and they have signified their willingness to accept the proposition contained in your letter for the payment of \$200 now and two new notes for \$400 each, dated August 1, 1908, payable one to Minnie Farnsworth and the other to Corrine Loveland, and they have left your note with me, and if you will send the \$200 and the two notes for \$400 each as above indicated, I will cancel and return your former note, thus carrying out your suggestion. It is also proper to add that no particular notes are mentioned in the will.

I enclose for your information copy of will of Mrs. Fensky left in the possession of Mr. Don Ferguson of this city. It is evident from the will and from the conveyances made at the same time it was executed, and from other things that Mrs. Fensky thought that she could make either a separate will, or separate transfer for every piece of property she had, and that that will was intended to dispose of the Kansas real estate, land contracts, and mortgages only, and as the will was prepared

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by a Notary, who was not a lawyer, her erroneous notion was not corrected by him. But there was a little money left on hand in the bank, and there may be a few other items of property that should be adminis-

tered upon here, and the heirs have all united in asking me to act as administrator of the property here. But of course in order to get letters issued here, we must probate the will here, even though it has no effect upon the property here. And as the witnesses of the will are here, I have advised that the will be proved here first, and then that a properly authenticated copy of the will and record of probate be forwarded to you in order that you may administer upon the Kansas property in accordance with the terms of its provisions. And if this plan meets with your approval, it may be well for you to say that when replying to this letter.

There is one other matter that may be well to mention, and that is that there seems to be a little feeling on the part of George and Charles Fensky, who came here from Berkely after Mrs. Fensky's death, who seem to be somewhat disappointed that a more liberal provision was not made for them, and George in particular seems to have been a little put out because of an effort to hold him to account for \$200, which was either given, or loaned to him during Mrs. Fensky's life time to the extent of requiring him to give \$100 of it to Charles. And there was a little talk of making some sort of a contest, and a rumor that they were employing counsel, and of another will made previously to this one with different provisions. But I can not myself see how they would have reasonable prospects of success in any sort of a contest. But I suppose they would try to enlist the co-operation of others on the Fensky side of the house,

(Testimony of J. H. Merriam.)

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many of whom, as I am informed, live in your city, and I thought you might perhaps have an opportunity to influence them to such a course as would avoid litigation.

The heirs of Mrs. Fensky seem disposed to be fair, and to do anything in their power to avoid unfriendly relations.

Hoping to hear from you soon, I remain

Very sincerely yours, J. H. Merriam.

JHM'/LCP

P. S. I might add that if you prefer to do so, you can send the money and notes above referred to to the Union National Bank of this city for delivery on the return of your note.

J. H. M.

(Witness continuing): I had been employed by the relatives of Mrs. Fensky, and it had been arranged before the writing of that letter that I should be the administrator of Mrs. Fensky's estate. The nomination of myself as administrator of the estate of Jeanette Fensky upon which I acted in applying for letters of administration was dated and acknowledged before a notary public July 18, 1908. This was prior to the time I wrote my letter to Mr. Campbell.

I don't recall ever having a note that was executed by George Fensky to Mrs. Jeanette Fensky, but I think it was one of those matters that Mrs. Fensky attempted to write a similar letter about to the others, -- an attempt to make a gift causa mortis. I do not recall

(Testimony of J. H. Merriam.)

that the note came into my hands. My recollection is that the heirs discussed all of those things and agreed among themselves that they would raise no technical questions about those things that she had attempted to do to dispose of her property, -- to leave it as she left it, or attempted to. In fact my recollection is that they consented in one case where there was a note of \$200.00 which she attempted to give to Mrs. Coughlin -- Mrs. Laura Coughlin, but which had been paid in before her death, I think, because they decided to carry out her intent as far as they could. They consented that that \$200 should even be paid out of the estate, because that note had been collected before Mrs. Fensky's death. And I think that you will find among the papers of the estate a written consent to that effect on the part of the heirs, and that was included in some form, either in the account or otherwise, and approved by the court, because the heirs had consented to it. The papers in the estate will show that, I think.

At the time I was employed to act as administrator I was paid a retainer of \$100 and \$25 for expenses. In my final account account I credited myself with commissions allowed by law on \$3509.38, the total value of the estate, \$170.37. I also credited myself in the final accounting with attorney's fees agreed on, subject to the approval of the court, \$350.00. The sum of \$125 referred to as a retainer fee and expenses was outside and not mentioned in the account.



(Testimony of J. H. Merriam.)

We found that Mr. Ferguson had been doing a great deal of business for Mrs. Fensky looking after all her affairs, buying and selling property, and it seemed important that we should find out whether there was anything in the transactions with Mr. Ferguson that would show any claims in favor of the estate against him. He had put in a claim as I recall it, for \$1100., one note for a thousand dollars, on which there was a hundred dollars or so interest, and as administrator I had to decide first whether that note should be paid, that is, whether the claim should be allowed. I found it quite difficult to get at the facts, but by a good deal of work and investigation and asking Mr. Ferguson to let me look through his books, which were not kept in very clear form, and finally getting access to his books and all the papers that he had, I found that subsequent to the date of the note Mrs. Fensky had deeded some property to him and taken from him a receipt in full to date. And I insisted that the claim for the note should not be allowed because of that receipt in full made subsequently. There were also a good many collections of rent and other transactions. And after going very carefully into Mr. Ferguson's account and having a great many conferences with him, and with the young man who kept his books at one time, I finally found some evidence that Mr. Ferguson owed the estate about \$1725., according to his books, as nearly as we could find out what his books showed. I then insisted in negotiations with Mr. Ferguson that not only should his claim on



(Testimony of J. H. Merriam.)

that thousand dollar note be disallowed but that he ought to pay -- ought to account to the estate for \$1725, which, as I figured it, was what his books apparently showed he owed the estate. There were a great deal of negotiations about that, and great deal of work done in connection with those claims. He finally offered, I think, \$250, -- offered to withdraw his claim on the note and adjust it for \$250, and after some time he finally raised that to \$375, and then I submitted a report to all the heirs showing what seemed to have been discovered from Mr. Ferguson's books in regard to what he owed the estate, and putting it up to them that he had offered this \$375, and asking their instructions as to what should be done about making an amicable compromise or settlement of the claim, and suggested that it might by meeting him half way, even on his own books, between his offer of \$375 and the \$1725., to take \$1050. And he was not able to pay that; and they finally authorized me to make that compromise with him if I could, and we finally consented to do that, but could not pay the \$1050, and said he would give his note; and if I am not mistaken, his wife signed the note, and it was for all the arduous work that I had done in that connection, and also in looking up the records. I had my son go to San Benito County and down to Orange County, and here in this county -- I think Mrs. Farnsworth did the same, to some extent -- to find whether there were transactions which were not shown on Mr. Ferguson's books, and which might disclose some other

(Testimony of J. H. Merriam.)

estate belonging to the estate, which we didn't know. It was for extraordinary services of that kind that I submitted to the heirs whether inasmuch as the result of this work the estate had been saved on this claim and on the Amanda Katzung claim, something like \$3,000., that we probably could not have saved otherwise,—whether they thought it would be reasonable for me to ask this additional item of \$350. attorney's fee, and they all consented to it, and was approved by the court, and I felt it was a very reasonable fee for the services actually rendered, and that really produced results for the benefit of the estate.

I never questioned the validity of the deeds executed by Mrs. Fensky prior to her death. In the trial of the case of Farnsworth vs. Ferguson I testified at the request of the court. In that case on November 4, 1910, I testified as follows:

“Q Did you make any suggestions that all the property be included in the probate proceedings?

“A No; I don't remember that I ever made that suggestion. It came up—the question of the validity of the deeds and whether they should be contested in any way.

“Q You never thought of questioning the validity of the deeds?

“A No, sir, I did not, except I thought that the heirs of Mr. Fensky might do it.”

#### CROSS EXAMINATION.

BY MR. POORMAN:

Q Judge Merriam, you spoke about extraordinary services in connection with the Don Ferguson matter,

(Testimony of J. H. Merriam.)

and detailed at some length what those services consisted of. Then in summing the matter up, you referred to the services in the Katzung claim. Will you state what services of an extraordinary nature you rendered respecting the Katzung matter?

A Well, as shown on the claim from which I read, what appeared in that case, there was a claim put in by Mrs. Katzung containing several items, part of which was for services which she claimed she had rendered Mrs. Fensky in nursing, or something of that kind, prior to her death, and one item, I think, of \$748. that she claimed to have loaned money. I don't remember now all of the details of that, but I tried very hard to get at what was fair and just between the parties at that time, and did my best to get any action that was taken, approved by all of the parties. It took a great deal of correspondence, a good many conferences and a good deal of work to finally secure the consent of all the parties to allowing what was allowed on the Katzung claim, and to securing from Mr. Thompson the withdrawal of that item in that claim. I don't recall all the details of that now, but I know that during the little more than a year that I was administering this estate I did a great deal of work trying to get these interested parties to agree in some form, or having a controversy in some form.

Q Was an expert employed to go over Don Ferguson's books or did you do that work yourself?

A I did that work myself, with a little assistance received from a young man who had been in Mr. Fer-

(Testimony of J. H. Merriam.)

guson's office, and who was familiar with the books. And with Mr. Ferguson's consent and with his assistance, because Mr. Thompson hadn't been willing for me to employ an expert, I felt that it was important for that work to be done, and rather than to have any controversy as to whether an expert should be employed, I really did it myself.

(Witness continuing): The receipt dated August 8, 1908, signed by R. P. Congdon, guardian of the estate of Corrine Loveland, was drafted by me. Also the receipt dated August 8, 1908, signed by Minnie Farnsworth.

Receipts were offered and received in evidence as Defendants' Exhibits B and C as follows:

Exhibit B.

J. H. Merriam

Attorney and Counsellor at Law  
Union Savings Bank Building.

Pasadena, Calif. Aug. 8, 1908.

Received of M. T. Campbell one hundred dollars cash and note for \$400. in favor of my ward Corinne Loveland signed by M. T. Campbell and Louise A. Campbell being accepted as the share of said ward of a gift causa mortis given by Jeanette Fensky, since deceased, to Minnie Farnsworth and my said ward jointly of a note for \$1000 - by said M. T. & Louise A. Campbell in favor of said Jeanette Fensky -

R. P. Congdon,

Guardian of the Estate of Corine Loveland.



(Testimony of J. H. Merriam.)

Exhibit C.

J. H. Merriam

Attorney and Counsellor at Law

Union Savings Bank Building.

Pasadena, Calif. Aug. 8, 1908.

Received of M. T. Campbell one hundred dollars cash and note for \$400.00 in my favor signed by M. T. Campbell and Louise A. Campbell – being accepted as my share of a gift causa mortis given by Jeanette Fensky since deceased to Corinne Loveland and myself jointly of a note for \$1000 – by said M. T. & Louise A Campbell in favor of said Jeanette Fensky –

Minnie Farnsworth.

(Witness continuing):

In explanation of my testimony given in the Superior Court I will say this, that the possibility of someone raising some question, especially among these heirs, as has been indicated by some of the testimony given before, was always present. Of course, there was no definite question raised by anybody, so far as I know, as to the validity of those deeds, but because of the attitude of the parties and what I feared they might do to get into controversy and litigation, I was seeking to advise them against litigation or controversy of any kind and to adjust all questions among themselves, and to do it amicably, and I think I advised them to carry out in good faith what the effort of Mrs. Fensky was to dispose of her property in the way that this was done. That is all to that extent. The possibilities of someone raising the question of validity came up, but



(Testimony of J. H. Merriam.)

there was no particular question of validity raised, so far as I recall.

#### REDIRECT EXAMINATION.

I don't know that anyone said anything about the possibility of someone raising a question as to the validity of those deeds. Some of the parties were dissatisfied. The only thing that occurred to me was that if they were dissatisfied with the disposition that was made, someone might raise the question of undue influence or possibly because of Mrs. Fensky having been sick for some time before her death, the possibility of whether she was competent when any of these acts were done. Those are the only things that ever occurred to me as the possible basis of any question. And no others were raised in my presence.

No one had made any threats of a contest that I know of except that Mr. Thompson had, in a sense, indicated that he might raise some question if his claim wasn't allowed.

I never understood that there was a possibility of a contest with the Fensky heirs. I had no expectation of that kind.

Whereupon the Complainants rested.

#### D E F E N S E.

EUGENE WELLKE,

one of the defendants, called as a witness in his own behalf, testified as follows:

#### DIRECT EXAMINATION.

I am one of the defendants. I am past eighty-one years of age. I am a brother of Jeanette Fensky.

(Testimony of Eugene Wellke.)

Mrs. Fensky was working in a hotel at the time that she married Ferdinand Fensky, Immediately following their marriage she was running a boarding house, and he had an ice business. I think they came to California in 1902.

Q Can you tell the court in what manner Mr. Fensky ran his ice business at the time of his marriage to Mrs. Fensky and following the marriage?

A Well, he had been hauling it out at that time on a wheel-barrow. I helped him haul the ice out, delivering it in a wheel-barrow myself. He hauled it out in a wheel-barrow, peddling it around.

THE COURT: What is the idea of this?

MR. EDWARDS: The idea is to show that the property accumulated by the Fenskys was the property accumulated by the two of them through their combined labor. It was not property that he inherited through his own property, it was property that those two old people accumulated by hard labor throughout their lives, and I should think would be persuasive to some extent as to her right of disposing of the property on her death.

THE COURT: Is there any question about that, about the fact?

MR. WILSON: No, I don't think there is any question about that, if the court please, but that is immaterial, because in Kansas, there is no community property law.

THE COURT: No, there is no question about that fact though.

MR. WILSON: No.

(Testimony of Minnie S. Farnsworth.)

MINNIE S. FARNSWORTH,

one of the defendants, called in her own behalf, testified as follows:

DIRECT EXAMINATION.

I came to California in 1896. Prior to coming here, I lived with Mr. and Mrs. Fensky in Topeka. I lived with them from 1884 to 1896. For several years Mr. Fensky had a hotel. Part of the time Mrs. Fensky did the cooking for the hotel.

I am acquainted with the property referred to in this action as the Addition property. It was about a mile from the main business section of Topeka. Neither of the plaintiffs lived near the property. There were floods in Topeka in 1903 and 1904.

I am acquainted with lots nine and ten at San Pedro, that have been spoken of in this action. They were constructing a building on the property when Mr. Fensky became ill, and was taken to Altadena. The house was built in four apartments.

Following Mr. Fensky's death, I went to live with Mrs. Fensky, and lived with her until she died, with the exception of a little while I was with my parents in Pasadena. While living with her, I helped her with the housework and writing.

I was present at Mrs. Fensky's house September 18th, 1907, when some papers were signed. In the morning my aunt told me to telephone to Mr. Ferguson to come out and make out the papers, which I did. He came and went to her bedside, and got from her the information to whom she wanted each piece

(Testimony of Minnie S. Farnsworth.)

to go. No one was with him at that time. In the afternoon of the same day, he returned with the notary, Mr. Parmele. Mr. Parmele went over to Aunt Jennie's bed, and got out the papers one by one, and told her what property went to each person; and she signed it and then he took it and folded it up, and passed it to Mr. Ferguson, until the fourteen deeds were all signed. She signed also two releases and a will. I was standing at the door about six or seven feet from the bed where my aunt was lying. I could hear what she and Mr. Ferguson said to each other. After the various documents were signed, she looked to Mr. Ferguson and said, "You take these papers and hold them, and in case of my death, record them the next day." I do not recall that she made any further statement or gave any further instructions. She spoke in a tone of voice such as to enable me to hear her readily. I did not hear my aunt say to Mr. Ferguson in effect, "You can sell any of this property that you want, or handle it just as you used to." I did not hear her say anything other than what I have just stated. I remained in that position in the doorway until after Mr. Ferguson and Mr. Parmele departed. I remember that they went back to their chairs and Mr. Parmele did up the papers and then they left. Aunt Al Schmidt and Aunt Amanda Katzung, and perhaps Corrine Loveland were right with me in the door. During the occasion when these documents were signed, I was not asked by anyone to withdraw from the room. In the morning after Mr. Ferguson had given some of the names, my aunt



(Testimony of Minnie S. Farnsworth.)

did not have it clear in her mind as to just whether she was dividing it equally, as she would like, so she asked us to leave the room for a few minutes, which we did. But in the afternoon when they came for the documents, no one asked any of us to withdraw. We sort of withdrew because in the morning she had asked us to, so we felt just a little reticent about being near.

At the time of my aunt's marriage to Mr. Fensky, she had earned several hundred dollars working in various ways. Also a few hundred dollars were left to her by a former sweetheart, who died. My aunt told me about this.

After my aunt's death, I expended certain moneys that had been hers in the bank. I paid some of the bills that had been contracted during her sickness, out of the account called the Minnie Farnsworth Special. Judge Merriam asked me to account for the money that I had spent. I turned in the checks as shown by the bank statement. Subsequently to my aunt's death, there were no conferences at Judge Merriam's office at which I was present, in which the question was discussed as to whether or not the deeds made by my aunt, September 17th, 1907, had been delivered in a valid manner.

I knew of the existence of certain releases which are in evidence here, which were signed by heirs of Mr. Ferdinand Fensky, during the course of his estate. I was acting as my aunt's private secretary, and did the correspondence for her, between her and Mr.

(Testimony of Minnie S. Farnsworth.)

Campbell. The first time that I ever heard that any of the heirs of Ferdinand Fensky claimed that those releases were for any reason invalid or not binding, was when they began this suit. Charles Richter and George Fensky, nephews of the Fensky heirs, were in California about the time of my aunt's death. One lived in Berkeley, and one at Oakland.

Q Were either of the plaintiffs in this case, or of the Ferdinand Fensky heirs, out in California to see Mrs. Fensky during her last illness?

A Well, Laura Coughlin lived here, and Mrs. Pickens was here some time, I think it was between the death of Mr. Fensky and Mrs. Fensky.

Q Did you ever have any conversation with any of them with respect to the Ferdinand Fensky estate?

A No.

#### CROSS EXAMINATION.

My aunt died July 9th, 1908. On the 23rd of July, I executed a deed conveying to my father, Eugene Wellke, all of the property that had been conveyed to me by Mrs. Fensky. On the same day he executed a deed conveying to me all of the property that had been conveyed to him by Mrs. Fensky. On the 24th of July, we executed deeds, conveying the property back to the original holders. On one day I conveyed to him and he conveyed to me, and on the next day we reversed the action.

Q Those deeds were made, weren't they, Mrs. Farnsworth, because you were then fearing some kind of

(Testimony of Minnie S. Farnsworth.)

contest from some of the Fensky heirs, were you not?

A Not the Fensky heirs.

Q Well were you afraid of a contest from some source?

A Well, as I said before, father was not wholly satisfied with the way the division was.

Q Well, now, just answer my question, Mrs. Farnsworth.

A What was the question?

(Question read)

A Perhaps so.

Q Well, from what source, then?

(Witness continuing): My father had not been wholly satisfied with the division. Then later on there were rumors in the air about the question that Mr. Thompson raised in regard to what the attorney told him about the validity of the deeds. There were rumors outside of Judge Merriam's office. I did not learn of the advice that Mr. Thompson had obtained from Judge Unangst in Judge Merriam's office, but it was downstairs on the street. Whatever rumors there were, I got from Mr. Thompson. Mr. Thompson told me that he had seen an attorney in San Luis Obispo, and that the attorney had told him that he considered that these deeds were not delivered. I really did not fear a contest from the Fensky heirs myself, but after Mr. Thompson had treated the property that Mrs. Katzung had received as he did, and Aunt Al Schmidt had done the same with hers, I thought it would not hurt anything if we did the same.

(Testimony of Minnie S. Farnsworth.)

Q Well, you thought that you and your father would try the same hocus pocus with your property that the other people had tried with theirs, did you?

A Well, if you call it hocus pocus.

Q Well, what do you call it?

MR. EDWARDS: I object to it as immaterial.

MR. WILSON: Probably it is.

THE COURT: Yes.

MR. EDWARDS: The act speaks for itself.

THE COURT: It is immaterial what she called it.

Q BY MR. WILSON: Well, now, you made those deeds to your father and your father deeded back to you, just simply to try to cover up the title from somebody that might contest, didn't you?

A Well, that was what was told us by Mr. Thompson. That was his idea. It was figured around, and we finally did do that.

(Witness continuing): I don't recall that a dollar passed between us as consideration for these transfers.

On the afternoon when Mrs. Fensky signed these deeds, I just went to the door; I was not out of the room.

At the trial of the case of Farnsworth against Ferguson, I testified as you now read to me from the transcript of the evidence in the said action, as follows:

“Q Where were you when you heard these instructions given with reference to the delivery of the deeds?

“A I must have been in the hall.

“Q Then you were not there when any instructions



(Testimony of Minnie S. Farnsworth.)

were given, if so given, in the afternoon when the deeds were executed?

"A I was in the hall part of the time and heard that remark, but whether it was in the afternoon or morning, I don't know."

(Witness continuing) Well the hall is right at her door. That testimony is not exactly correct if there is a difference of half an inch. I also testified as you now read to me from said transcript.

Q BY MR. MERRIAM: Were you present when the deeds were executed in the afternoon?

A I was not in the same room. My room was joining, and I was in the hall and in my room part of the time.

Q Did you hear any part of the conversation at that time or know of any of the executions of deeds?

A I heard part of the conversation, but I didn't consider it important for me to be right there in the room.

#### REDIRECT EXAMINATION.

In my former testimony I must have been confused between the time that Mr. Ferguson came in the morning, and the time the deeds were made out. That is the only explanation I can give.

#### RE CROSS EXAMINATION.

Q Now I will read these questions, some of which I read before, but I will read them all so as to connect it all up:

Q Where were you when you heard these instructions given with reference to the delivery of the deeds?

(Testimony of Minnie S. Farnsworth.)

A What?

Q Where were you when you heard these instructions given with reference to the delivery of the deeds?

A I must have been in the hall.

Q You were not in the same room?

A If they were given that morning, I was in the same room, sitting on the bed beside her.

Q Were they given in the morning or afternoon?

A My impression is they were given in the morning.

Q Then you were not there when any instructions were given, if any were so given in the afternoon, when the deeds were executed?

“A I was in the hall part of the time, and heard that remark, but whether it was in the afternoon or morning, I do not now know.

You so testified, did you?

A Whatever is there.

(Witness continuing): It may have been that I was confused at that time, as to whether it was in the morning when Mr. Ferguson was there and got the name for each piece, or whether it was in the afternoon when the deeds were executed.

While Mr. Fensky was living in Kansas he was a contractor and builder. That was his trade for several years. He had made plans and built on his own property. He had not been engaged in the ice business for a number of years before he left Kansas.

The defendants offered in evidence a certified copy of a deed dated May 27, 1902, from Mrs. L. A. Thompson to Ferdinand Fensky, covering Lot 9, Peck's

subdivision, San Pedro, the consideration being \$1025.00.

The plaintiffs objected to the introduction of the deed upon the ground that the same was incompetent, irrelevant and immaterial, and not evidence of the value of the property or of the price paid for it. Objection overruled and exception noted.

The defendants offered in evidence a deed dated May 22, 1902, from George Peck, Jr., to F. Fensky, covering Lot 10, Peck's subdivision, the consideration being \$1000.00.

The plaintiffs objected upon the same ground last stated. The objection was overruled and exception noted.

The defendants offered in evidence a deed from Stearns Ranchos Company to Ferdinand Fensky, dated July 29, 1889, covering the southwest quarter of the southeast quarter, and the south half of the northwest quarter of the southeast quarter of Section 4, Township 5 south, Range 10 West, San Bernardino Base and Meridian, the consideration being \$10.00

The plaintiffs objected upon the same grounds last stated. Objection overruled and exception noted.

The defendants offered in evidence deed dated March 26, 1889, from S. O. Lindsay, administratrix of the Estate of Calvin Lindsay, Deceased, to Ferdinand Fensky, covering the west half of the southwest quarter of the northwest quarter of Section 24, Township 5, South, Range 10 West, San Bernardino Base and Meridian, the consideration being \$1501.00.

The plaintiffs objected upon the same grounds last stated. Objection overruled and exception noted.

The defendants offered in evidence a deed dated February 28, 1903, from T. S. Palmer to Ferdinand Fensky, covering property on New High Street, Los Angeles City, described in the bill of complaint, and in the inventory and appraisement of the Ferdinand Fensky Estate, the consideration being \$1000.00.

The plaintiffs objected upon the same grounds last stated. Objection overruled and exception noted.

The defendants offered in evidence a deed dated March 30, 1903, from George H. Peck, Jr., et al, to F. Fensky, covering lots 19 to 29, inclusive, block C, of Peck's subdivision, Carolina tract, in the City of San Pedro, the consideration being \$2362.50.

The plaintiffs objected upon the same grounds last stated. Objection overruled and exception noted.

Thereupon it was stipulated by counsel for plaintiffs and for the defendants, that in the matter of the Estate of Ferdinand Fensky, Deceased, Jeanette Fensky was duly and regularly appointed administratrix, and that she qualified as such; that due notice was given to creditors; that appraisers were duly appointed, that the property was appraised by the persons so appointed, and that they made their return according to statute, the inventory and appraisement being a part of the record of this case.

The defendants offered in evidence an order for widow's allowance, whereby in the said Ferdinand Fensky Estate, the court ordered that there be allowed and paid to the widow for her maintenance and sup-



port, the sum of \$50.00 per month beginning August 7, 1903, and continuing until the further order of the court, not exceeding one year.

The defendants offered in evidence an order of the court made in the said Ferdinand Fensky Estate, setting apart for the use of the widow the wearing apparel and household furniture of the decedent, valued at about \$100.00, the said order having been entered November 4, 1903.

The defendants offered in evidence a petition for an order to set apart a homestead filed in the said Ferdinand Fensky Estate, November 3, 1903. The said petition recited that the decedent was a resident of Los Angeles County at the time of his death, and left estate in the said county; that the letters of administration were issued October 15, 1903; that the inventory and appraisal was returned and filed October 26, 1903; that there were no debts or claims against the estate, except the costs of administration; that neither the said decedent nor the petitioner, Jeanette Fensky, had ever made a selection of a homestead under the laws of the State of California; the names, ages and residences of the heirs of the decedent; that for about two years the decedent and the petitioner resided together in a dwelling house situated upon lots 9 and 10, of Peck's subdivision of block 74, San Pedro; that they were residing there at the time of Ferdinand Fensky's death, and that the petitioner continued to reside there after his death; that the value of the said land including the dwelling house and appurtenances did not exceed \$5000.00, and was appraised at the sum

of \$3000.00; that the said property was the community property of the decedent and the petitioner. The petitioner asked that the said land together with the dwelling house and its appurtenances be set apart as a homestead for the said Jeanette Fensky, widow of the decedent.

Defendants offered in evidence an order appearing in Volume 106, Minutes and Orders, Superior Court of Los Angeles County, page 84, as follows:

“Be it remembered, that on the 4th day of November, 1903, in Department 2 of the Superior Court of the County of Los Angeles, State of California, Hon. Curtis D. Wilbur, Judge Presiding: Present, Mr. W. L. Warren, Deputy Clerk. The following proceedings were had, to-wit:

“In the matter of the Estate of Ferdinand Fensky, Deceased. No. 6647. Order setting apart homestead.

“On motion of Jeanette Fensky, administratrix of the estate of Ferdinand Fensky, deceased, a widow of said deceased, it is ordered by the Court that the land described as follows, to-wit: Lots 9 and 10 of Peck’s Subdivision of Block 74 of the City of San Pedro, Los Angeles County, State of California, as per map recorded in Book 1, Page 23, of Maps of said County, together with the dwelling house and appurtenances situated thereon, be and the same is hereby set apart as a homestead for Jeanette Fensky, widow, as aforesaid, and that said land is community property and is set apart to said widow, her heirs, executors, administrators or assigns forever.



Rent from farm in Orange County .....	100.00	
	<hr/>	
TOTAL CHARGES.....		\$6,800.00

## CREDITS.

Probate homestead set apart to widow by Court order dated November 4th, 1903,.....	\$3,000.00	
Exempt personal property set apart to widow by court order of Nov. 4th, 1903,.....	100.00	
Publishing notice to creditors...	4.00	
Court fees.....	11.00	
Appraisors fees.....	9.00	
Funeral expenses, Vouchers Nos. 1 and 2.....	197.75	
Monument..... “ “ 3	212.00	
Premium on Surety Company bond .....	10.00	
County and City Taxes on all properties .....	50.87	
Family allowance to widow, per order of Court, 12 months at \$50.00 per month.....	600.00	
Attorneys fees, per agreement and subject to order of court..	165.00	
Administratrix fees allowed by law .....	360.00	
	<hr/>	
TOTAL CREDITS.....	\$4,719.62	\$4,719.62
Which, deducted from total charges, leaves a balance of...		<hr/> \$2,080.38



The said balance consists of the following described property, and is made up as follows:

That certain piece or parcel of land situate, lying and being in the City of Los Angeles, County of Los Angeles, State of California, and bounded and described as follows, to-wit: Commencing at a point in the westerly line of New High Street, distant 200 feet southwesterly from the southwest corner of Alpine (formerly Virgin Street) and New High Street, thence southwesterly along the said westerly line of New High Street 73 feet to a point, thence westerly and at right angles to said westerly line of New High Street 65 feet to a point, thence northeasterly and at right angles to last mentioned course and distant and parallel with said westerly line of New High Street 73 feet to a point, and thence easterly by a straight line 65 feet to said westerly line of New High Street at the point of beginning or commencement, and being parts of lots 10 and 11 in Block 33 of Ord's Survey, as per map recorded in the office of the County Recorder of Los Angeles County, in Book 53, page 66, Miscellaneous Records of said County of Los Angeles.....

.....Appraised value \$600.00

Lots 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 in Block "C" of Peck's Subdivision

of Carolina Tract, in the City of San Pedro,  
Los Angeles County, State of California,  
appraised at the sum of..... \$600.00

Twenty acres of land in Orange County  
(formerly Los Angeles County) California,  
and known and described as the west half of  
the southwest quarter of the northwest quar-  
ter of Section 24 Township five South Range  
10 west, San Bernardino Base and Meridian,  
appraised at the sum of..... \$600.00

Sixty of acres of land in Orange County,  
formerly Los Angeles County, California,  
and known as the southwest quarter of the  
southeast quarter and the south half of the  
northwest quarter of the southeast quarter  
of Section Four, Township 5 South Range  
10 west, San Bernardino Base and Meridian,  
appraised at the sum of.....\$1,400.00

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TOTAL REAL ESTATE ON HAND..\$3,200.00

Less amount advanced by Administratrix  
from her personal funds in paying debts and  
expenses of Administration..... 1,119.62

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Leaves balance on hand, as above.....\$2,080.38

Letters of Administration were duly issued upon  
said estate, on the ..... day of ..... 1903.

Notice to creditors has been duly published, the first  
publication thereof having been made on the 24th day  
of October, 1903.

An inventory and appraisement of said estate was  
duly returned and filed on the 26th day of October,

1903, showing said estate to be of the value of \$6,700.00.

All claims presented and allowed against said estate have been fully paid as shown by the foregoing account.

Said estate is now in a condition to be finally settled and distributed.

The following named persons are the next of kin and only heirs at law of said deceased, to-wit:

Jeanette Fensky, widow, age 57 years, San Pedro, Calif.

Friedrich Fensky, brother, age 60 years, Leavenworth, Kas.

Ida Wendt, sister, age 62 years, Kulmsee, Germany.

Hulda Richter, sister, age 58 years, Berkley, Calif.

Johanna Schutt, sister, age 56 years, Omaha, Nebraska.

Louise Pickens, sister, age 56 years, Topeka, Kansas.

Augusta Krauss, sister, age 54 years, Topeka, Kansas.

Charles Fensky, brother, age 52 years, Pueblo, Colorado.

George Fensky, nephew (son of Herman Fensky, brother, deceased) age 25 years, Topeka, Kansas.

Said deceased left no last will and testament.

That there is a collateral inheritance tax due upon the shares of all the above mentioned heirs, excepting the widow, which amounts as follows:

Balance to be distributed.....\$2,080.38

One-half to widow..... 1,140.19

---

Leaves a balance due brothers, sisters and

nephew of

\$1,140.19

On which figure collateral inheritance tax at

5%- 52.00

That your petitioner, the widow of said Ferdinand Fensky, deceased, owing to the large amount of real estate in said estate, has advanced from her own personal funds the money necessary to pay the debts of said deceased and the expenses of administration, and has purchased from all of the above mentioned heirs-at-law all of their right, title and interest in and to the estate of said deceased, and herewith presents receipts and quit-claim deeds from them.

Wherefore, said Administratrix prays that said account may be approved, allowed and settled, and that decree be made for the distribution of the entire estate to the widow of said Ferdinand Fensky, deceased, to-wit: Jeanette Fensky, and for all other and proper relief.

Jeanette Fensky.

John V. B. Goodrich, Attorney for Administratrix.

(Duly verified)

The same was endorsed as follows:

Los Angeles, Cal. April 1, 1905. The hearing of the within Petition for Settlement of Account and for Distribution is hereby set for the 11<sup>th</sup> day of Apr. 1905, at 10 o'clock A. M. in Dep't. 2 of the Superior Court of Los Angeles County, California.

C. G. KEYES, Clerk. By W. L. Warren, Deputy. Filed Apr. 1, 1905. C. G. Keyes, Clerk. By W. L. Warren, Deputy.

The defendants offered in evidence the notice of settlement of the final account and hearing of petition



for distribution and affidavit of posting in the said Ferdinand Fensky estate which were received in evidence and marked Defendants' Exhibit P. The same is as follows:

IN THE SUPERIOR COURT OF THE STATE  
OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES.

In the matter of the Estate of	)	
	)	Notice of Settlement of
Ferdinand Fensky,	)	Final Account and
	)	Hearing of Petition
Deceased.	)	for Distribution.

Notice is hereby given that the account of Jeanette Fensky, as Administratrix of the estate of Ferdinand Fensky, deceased, for the final settlement of said estate has been rendered for settlement; that a petition for the final distribution of said estate was filed with said account; that the 11th day of April, 1905, has been appointed as the day for the settlement of said account and the hearing of said petition for final distribution; and that the said matters will be heard at the Court Room of Department 2 of the Superior Court of Los Angeles, County, California. Dated April 1, 1905.

C. G. KEYES, County Clerk. By W. T. McNeely, Deputy.

STATE OF CALIFORNIA	)	
	)	ss AFFIDAVIT OF
County of Los Angeles.	)	POSTING.

Wm. T. McNeely, being duly sworn, says that on the 1 day of April A. D. 1905, at the request of the Clerk of the Superior Court of the County of Los Angeles,

he posted three notices, of which the foregoing is a copy, in three of the most public places in the said County of Los Angeles, to-wit: One of the said notices at the County Clerk's Office, one at the County Recorder's Office and one at the place where the said Superior Court is held in the City of Los Angeles.

Wm. T. McNeely.

Subscribed and sworn to before me, this 4 day of April,  
A. D. 1905.

C. G. KEYES, County Clerk.

By H. E. Riggins, Deputy.

Endorsed: Filed Apr. 5, 1905. C. G. KEYES, Clerk.

By W. L. Warren, Deputy.

The defendants offered in evidence the final decree of distribution in the Ferdinand Fensky estate appearing in Volume 115 of Minutes and Orders Superior Court, Los Angeles County, page 87, and the same was read into the record as follows: ,

"In the matter of the estate of Ferdinand Fensky, deceased: No. 6647.

"Order settling final account and for distribution.

"Now comes Jeanette Fensky, the Administratrix of said estate, by John V. B. Goodrich, her attorney, and proves to the satisfaction of the court that her final account and petition for distribution herein was rendered and filed on the 1st of April, 1905; that on the same day the clerk of this court appointed the 11th day of April, 1905, for the settlement and hearing thereof; that due and legal notice of the time and place of said settlement and hearing has been given

as required by law, and said account and petition are now presented to the court, and no person appearing to except to or contest said account or petition, the court, after hearing the evidence settles said account and orders distribution of said estate, as follows:

“It is ordered, adjudged and decreed by the court that said administratrix has in her possession belonging to said estate, after deducting the credits to which she is entitled, and including the sum of ten dollars hereby disallowed on bond, a balance of \$2,090.38, which consists of the property hereinafter described and that said account be allowed and settled accordingly; that said deceased left surviving as his only heirs at law, his widow, Jeanette Fensky, his nephew George Fensky, and the following brothers and sisters, to-wit: Friedrich Fensky, Ida Wendt, Huldah Richter, Johanna Schutt, Louise Pickens, Augusta Krauss, Charles Fensky; and that by reason of the conveyance to the said widow, as set forth in said petition for distribution, all the residue of the property of said estate as hereinafter described, and all other properties belonging to said estate, whether described herein, or not, be distributed as follows, to-wit:

“To Huldah Richter, sister of deceased, 1/16 part thereof and all the remainder to Jeanette Fensky, said widow of deceased. The property of said estate hereby distributed, so far as the same is known, is described as follows: That certain piece of land in the City of Los Angeles, County of Los Angeles, California, described as follows: Commencing at a point in the westerly line of New High Street, distant 200 feet southwesterly

from the southwest corner of Alpine (formerly Virgin Street) and New High Street; thence southwesterly along said westerly line of New High Street 73 feet; thence westerly at right angles to said westerly line of New High Street 65 feet; thence northeasterly at right angles to last mentioned course and distant and parallel with said westerly line of New High Street, 73 feet to point; thence easterly by a straight line 65 feet to said westerly line of New High Street at the point of beginning, and being parts of lots 10 and 11 in Block 33 of Ord's Survey, as per map recorded in Book 53, page 66, Miscellaneous Records of Los Angeles County. Also, lots 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29, in block C of Peck's subdivision of the Carolina Tract in the City of San Pedro, Los Angeles County, State of California.

"Also the following acreage in Orange County, formerly Los Angeles County, California, to-wit: 20 acres of land known and described as the west half of the southwest quarter of the northwest quarter of section 24, township 5 south, range 10 west, S. B. B. & M.; also in said Orange County (formerly Los Angeles County), California, 60 acres known as the southwest quarter of the southeast quarter and the south half of the northwest quarter of the southeast quarter of section 4, township 5 south, range 10 west, S. B. B. & M.

"Entered April 11, 1905. C. G. Keyes, County Clerk. By B. Smith, Deputy."

The defendants offered in evidence from the records in the Ferdinand Fensky estate a tax receipt of Orange County for the year 1903-04, for taxes paid on the



west half of the southwest quarter of the northwest quarter of section 24, township 5, range 10, showing the valuation of real estate \$400.00, valuation of improvements \$150.00, total net value \$633.00.

The plaintiffs objected to the introduction of the said tax receipt upon the ground that the same was incompetent, irrelevant and immaterial and not the best evidence of the value or assessed value of the property.

Objection overruled and exception noted.

The defendants offered in evidence a tax receipt of Orange County for the year 1903-04, for taxes paid on the south half of northwest quarter of southeast quarter of section 4, township 5, range 10, showing the valuation of real estate \$450.00, also the southwest quarter of the southeast quarter of the said section 4 showing a valuation of \$900.00.

The plaintiffs objected upon the same grounds last stated. Objection overruled and exception noted.

The defendants offered in evidence from the papers in the matter of the estate of Jeanette Fensky, deceased, No. 13286 in Superior Court of the County of Los Angeles, State of California, the petition for probate of will which was received in evidence and marked Defendants' Exhibit S. The same is as follows:

IN THE SUPERIOR COURT OF LOS ANGELES  
COUNTY, STATE OF CALIFORNIA.

In the matter of the estate of)	<u>PETITION FOR</u>
JEANETTE FENSKY,            )	
Deceased.                    )	<u>PROBATE OF WILL.</u>

To the Honorable, the Superior Court of the County of Los Angeles, State of California:



The petition of Eugene Wellke, Amanda Katzung, and Alma G. Schmidt respectfully shows; that Jeanette Fensky died on or about the 9th day of July, 1908, at Pasadena, in said Los Angeles County, California.

That said deceased at the time of her death was a resident of the said county of Los Angeles, State of California, and left property in the county of Los Angeles, State of California, consisting of money now in the bank in the name of the estate of said deceased about \$2,300.00, and some other items of personal property.

That the estate and effects of said deceased, which require administration in California does not exceed in value the sum of \$2,500.00.

That said deceased left a will bearing date the 18th day of September, 1907, in the possession of Don Ferguson of Pasadena, California, which your petitioners allege to be the last will and testament of said deceased.

That M. T. Campbell of Topeka, Kansas, is named in said will as executor thereof, and has relinquished his right to act as such.

That the subscribing witnesses to the said will are Don Ferguson and Lucius B. Parmele, both residing in the City of Pasadena, in said County of Los Angeles.

That the next of kin of said testatrix, whom your petitioners are advised and believe, and therefore allege to be the heirs at law of said testatrix, and the names, ages and residences of said heirs are: Eugene Wellke, aged about — years, residing at Pasadena, California; Amanda Katzung, aged about — years, residing

at Pasadena, California, and Alma G. Schmidt, aged — years, residing at Pasadena, California.

That by the terms of said will the said testatrix only disposed of certain property located in the state of Kansas, and did not dispose of any property left by her in California.

That at the time said will was executed, to-wit: on the said 18th day of September, 1907, the said testatrix was over the age of eighteen years, to-wit: of the age of 61 years, or thereabouts, and was of sound and disposing mind and memory, and not acting under duress, menace, fraud or undue influences, and was in every respect competent by last will to dispose of all her estate.

That said will is in writing signed by the said testatrix and attested by said subscribing witnesses who at the request of said testatrix, subscribed their names to the said will in the presence of said testatrix and in the presence of each other. And your petitioners allege that said witnesses at the time of attesting the execution of said will were competent.

That your petitioners have united in nominating as administrator with the will annexed of the estate of said deceased for that portion of the estate, which is situated in California, J. H. Merriam of Pasadena, California, in said Los Angeles County.

That the following are the names, ages and residences of the legatees and devisees referred to in said will as far as the same are known to your petitioners: George Fensky, 722 Howard Street, San Francisco, California; Bain Fensky, Leavenworth, Kansas; Laura

Coughlin, 4419 Tourmalin, R. D. 8, Box 43 Los Angeles, California; Addie Colton, Leavenworth, Kansas; Charles Richter, 1922 Bonita Avenue, Berkeley, California; Charges Schutt——— Schutt and two sisters (two sons and two daughters of Johanna Schutt) addresses and names unknown to petitioners; Augusta Pickens, Van Buren St., Topeka, Kansas; Anna McHenry, Wichita, Kansas, Genie Pickens, Topeka, Kansas; Josie Pickens, Topeka, Kansas; Hulda———, Topeka, Kansas; Irene Pickens, Topeka, Kansas; Sidney Pickens, Topeka, Kansas; Leopold Krauss, Topeka, Kansas; George Krauss, Topeka, Kansas; Antonia Krauss, Topeka, Kansas; Theresa Krauss, Topeka, Kansas; Howard J. Krauss, Topeka, Kansas; Charles F. Fensky, 10th & Van Buren Sts., Topeka, Kansas.

WHEREFORE your petitioners pray that the said will may be admitted to probate, and that letters of administration with the will annexed be issued to said J. H. Merriam, and that for that purpose a time be appointed for proving the said will, and that all persons interested be notified to appear at the time appointed for proving the same, and that all other necessary and proper orders may be made in the premises.

Dated Aug. 1st, 1908.

J. H. Merriam, Attorney for Petitioners.

Endorsed:

FILED Aug. 1, 1908. C. G. KEYES, Clerk. By D. S. Burson, Jr., Deputy Clerk.

Los Angeles, Cal. Aug. 1, 1908.

The hearing of the within Petition for probate of will is hereby set for the 14 day of Aug. 1908, at 10

o'clock A. M. in Dep't. 2 of the Superior Court of Los Angeles County, California.

C. G. Keyes, Clerk, By W. L. Warren, Deputy.

The defendants offered in evidence the testimony of subscribing witness on probate of will, also the testimony of applicant on probate of will in the said Jeanette Fensky estate, same having been filed August 14, 1908. The same was received in evidence and marked Defendants' Exhibit T, as follows:

IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, IN AND FOR THE COUNTY  
OF LOS ANGELES.

In the Matter of the Estate of)	TESTIMONY OF
JEANETTE FENSKY,	: SUBSCRIBING
Deceased.	) WITNESS ON
	: PROBATE OF
	) WILL.

STATE OF CALIFORNIA,	)
	; ss.
County of Los Angeles.	)

Don Ferguson of lawful age, and a competent witness, being duly sworn in open Court, testifies as follows:

I reside in the County of Los Angeles State of California; I knew Jeanette Fensky on the 18 day of Sept. A. D. 1907, the date of the instrument now shown to me, marked as filed in this Court on the 1st day of August A. D. 1908, purporting to be the last Will and Testament of the said Jeanette Fensky; I am one of the subscribing witnesses to said instrument; I also knew at the said date of said instrument, Lucius



A. Parmele the other of said subscribing witnesses. The said instrument was signed and sealed by the said Jeanette Fensky at Pasadena in the County of Los Angeles on the said 18th day of Sept. A. D. 1907, the day it bears date, in the presence of myself and of said Lucius A. Parmele and the said Jeanette Fensky thereupon published the said instrument as, and declared to us the same to be her last Will and Testament, and requested us in attestation thereof to sign the same as witnesses. The said Lucius A. Parmele and I then and there in the presence of the said Jeanette Fensky and in the presence of each other, subscribed our names as witnesses to the said instrument.

At the time of executing the said instrument, to-wit: the 18th day of Sept. 1907, the said Jeanette Fensky was over the age of eighteen years, to-wit: of the age of sixty one years, or thereabouts, and was of sound and disposing mind, and not acting under duress, menace, fraud, undue influence or misrepresentation.

Don Ferguson

SUBSCRIBED and sworn to in open Court before me this 14<sup>th</sup> day of Aug. A. D. 1908.

C. G. KEYES, Clerk.

By W. L. Warren, Deputy Clerk.

In the Matter of the	)	IN THE SUPERIOR
Estate of	)	COURT OF THE COUN-
JEANETTE FENSKY,	)	TY OF LOS ANGELES,
	)	STATE OF
Deceased.	)	CALIFORNIA.

STATE OF CALIFORNIA,	)	TESTIMONY OF
	)	: ss. APPLICANT ON
County of Los Angeles.	)	PROBATE OF
	)	WILL.

Min \_\_\_\_\_ being duly sworn in open Court, testifies as follows: I am the person named as \_\_\_\_\_

execut — in the document now shown to me, marked as filed in this Court, on the — day of — A. D. 19 — purporting to be the last Will and Testament of —; I am a niece of said deceased and lived with her for more than three years before her death; I reside in the County of — and am of the age of twenty-one years and upward; I knew said Jeanette Fensky she is dead, — She died on or about the 9th day of July A. D. 1908 at Pasadena in the County of Los Angeles, State of California.

At the time of her death she was a resident of the County of Los Angeles and left estate — in the County of Los Angeles State of California — in addition to certain property referred to in the will which she left in the State of Kansas —.

The real estate is of the value of \$ — or thereabouts, and the annual rents, issues and profits of said real estate amount to the sum of \$ — or thereabouts.

The personal property is of the value of \$2324.00 or thereabouts.

The said estate and effects, for or in respect of which the Probate of said Will has been applied for does not exceed the value of \$2350.— all of the estate of said deceased is in California is personal and separate property, the same having been acquired — marriage deceased being a widow.

The said document came into my possession as follows, to wit: filed and proved in this proceeding was left in the possession of Don Ferguson and I believe the same to be her last Will and Testament of Jeanette Fensky —

The next of kin of said deceased are Eugene Welke, brother, aged 70 years residing at Pasadena, California, Alma J. Schmidt, sister, aged 66 yrs. residing at Pasadena, California, and Amanda Katzung, sister aged 68 years, residing at Pasadena, California.——

On the 18th day of Sept. A. D. 1907, when said Will was executed, said deceased was over the age of eighteen years, being of the age of sixty one years or thereabouts, and was of sound and disposing mind.

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MINNIE S. FARNSWORTH

SUBSCRIBED and sworn to in open Court before me this 14<sup>th</sup> day of Aug A. D. 1908.

C. G. KEYES, Clerk,

By W. L. Warren, Deputy.

The defendants offered in evidence from the files of the said Jeanette Fensky estate a document which was received in evidence and marked Defendants' Exhibit U, which reads as follows:

No. 581 N. Raymond Ave., Pasadena, Calif.

Oct. 10, 1907.

C. W. Stadel and wife,

Shawnee Co., Hoyt, Kansas.

I have been sick all summer. In case I should not get well and pass on, I want the note of two hundred dollars you owe me to go to my niece, Laura Coughlin, Rose Hill, Los Angeles, Calif. She to hold same. This letter is written and signed in duplicate so that each hold one.

Sincerely yours, Jeanette Fensky.

Pasadena, Calif. August 31, 1909.

J. H. Merriam, Administrator with the will annexed of the estate of Jeanette Fensky, deceased.

We, the undersigned heirs of the estate of Jeanette Fensky, deceased, hereby authorize you to treat the within document as a gift causa mortis of the sum of \$200.00 to Laura Coughlin and as the note therein described was collected prior to the death of Mrs. Fensky and the proceeds thereof deposited to her account in the bank, we hereby agree that the sum of \$200.00 shall be paid to the said Laura Coughlin out of any cash on hand in said estate for distribution in order to carry out in good faith the purpose of said deceased as indicated by the within document.

Alma J. Schmidt, By H. H. Schmidt, Attorney in fact.

Amanda Katzung. By Wm. Thompson, Her attorney in fact.

Eugene Wellke. By Minnie S. Farnsworth, His attorney in fact.

ENDORSED:

FILED Sept. 22, 1909. C. G. KEYES, Clerk.

By W. L. Warren, Deputy.

The defendants offered in evidence the first and final account, report and petition for distribution in the said Jeanette Fensky estate, which was received in evidence and marked Defendants' Exhibit V. The same is as follows:



IN THE SUPERIOR COURT OF LOS ANGELES  
COUNTY, STATE OF CALIFORNIA.

In the matter of the will ) FIRST AND FINAL AC-  
and estate of JEAN- ) COUNT, REPORT AND  
ETTE FENSKY, ) PETITION FOR DIS-  
deceased. ) TRIBUTION.

J. H. Merriam as administrator with the will annexed of the estate of Jeanette Fensky, deceased, renders to the Court his First and Final account, and Report, and presents therewith his petition for distribution of said estate as follows, to wit:

Said administrator is chargeable as follows:

Amount of inventory and appraisalment. . . . . \$3509.38

Total charges . . . . . \$

And he is entitled to credits as follows:

To County Clerk . . . . .	\$ 6.00
To appraisers and notary . . . . .	11.00
Publication of notices . . . . .	9.00
Paid premium on Surety Company bond of administrator, 1st \$17.60 and 2nd \$8.80. . . . .	26.40
Services and expenses of clerk searching records . . . . .	15.00
To Ives, Warren & Salisbury funeral expenses	221.00
To William L. Innis, for granite marker and cutting inscription on monument. . . . .	18.00
Claim of Pasadena Lake Vineyard Land & Water Co. . . . .	2.25
Claim of C. J. Crandall Company . . . . .	16.00
Claim of Taylor Grocery Company . . . . .	7.22
Claim of Doctors Bleacher & Nichols. . . . .	\$ 50.00

Claim of Lucius A. Parmeles..... 55.50

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\$ 437.37

Forwarded .....\$ 437.37

Claim of Amanda Katzung .....\$ 594.80

Commissions allowed by law on \$3509.38,

the total value of the estate administered....\$ 170.37

Attorney's fee agreed on subject to approval

of Court .....\$ 350.00

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Total credits .....\$1552.54

which being deducted from total charges

leaves for distribution a balance of.....\$1956.84

The said balance consists of the following  
described property, to wit:

Cash on hand .....\$ 906.84

Note of Don and Ona N. Ferguson to the  
estate of Jeanette Fensky, deceased, for  
\$1050.00, dated August 2, 1909, payable on  
or before September 15, 1909.

Appraised at .....\$1050.00

---

Total .....\$1956.84

Letters of administration with the will annexed were  
duly issued upon said estate on the — day of Aug-  
ust, 1908.

Notice to creditors has been duly published, the first  
publication thereof having been made on the — day  
of August, 1908.

An inventory and appraisalment of said estate was  
duly returned and filed on the — day of September,  
1909, showing said estate to be of the value of  
\$3509.38.

All claims presented and allowed against said estate have been fully paid as shown by the foregoing account.

Said estate is now in condition to be finally settled and distributed.

The following named persons are the next of kin and only heirs at law of said deceased, to wit: Eugene Wellke, brother, of the age of — years, residing at Pasadena, California; Alma J. Schmidt, sister, of the age of — years, residing at Los Angeles, California; and Amanda Katzung, sister of the age of — years, residing at San Luis Obispo.

By the terms of the last will of said deceased, duly admitted to probate herein, certain property belonging to said deceased and situated in the state of Kansas, was devised and bequeathed to certain persons named in said will and described as the nieces and nephews of the deceased husband of said deceased, and the duly authenticated copy of said will was probated in the said state of Kansas by M. L. Campbell, the executor named in said will; and as your petitioner is informed and believes, the property located in Kansas has been in that proceeding administered upon and distributed under the provisions of said will.

That the property administered upon in this proceeding was situated in the State of California at the time of the death of said deceased and is not disposed of by the terms of said will, and is therefore distributable to the said heirs of said deceased in equal shares.

The said heirs being the brother and sisters of said deceased, the full amount distributable to each of them

from said estate comes within the exemption provided in the collateral inheritance tax law.

WHEREFORE said administrator asks that said Account be approved, allowed and settled, and that a decree be made for the distribution of all said estate to the persons entitled thereto and for all other proper relief.

J. H. Merriam, Administrator with the will annexed  
of the estate of said deceased.

In Pro per.

STATE OF CALIFORNIA, )  
 ) ss  
County of Los Angeles. )

J. H. Merriam, being first duly sworn upon his oath states that he is the administrator of the estate of Jeanette Fensky, deceased in the above entitled proceeding; that he has heard read the within and foregoing FIRST AND FINAL ACCOUNT, REPORT AND PETITION FOR DISTRIBUTION and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

J. H. Merriam.

Subscribed and sworn to before me this 8th day of  
September, A. D. 1909.

C. G. KEYES, Clerk. By C. O. Winters, Deputy.  
Endorsed:

FILED Sept. 8, 1909. C. G. Keyes, Clerk.

By C. O. Winters, Deputy.

Further endorsed:

Los Angeles, Cal. Sept. 8, 1909.



The hearing of the within Petition for settlement of account and for distribution is hereby set for the 22nd day of Sept. 1909, at 10 o'clock A. M., in Dep't. 2 of the Superior Court of Los Angeles County, California.

C. G. KEYES, Clerk. By W. L. Warren, Deputy.

The defendants offered in evidence the supplemental petition for distribution in the said Jeanette Fensky estate which was received in evidence and marked Defendants' Exhibit W. The same is as follows:

IN THE SUPERIOR COURT OF LOS ANGELES  
COUNTY, STATE OF CALIFORNIA.

In the matter of the will )	SUPPLEMENTAL
and estate of )	PETITION FOR
JEANETTE FENSKY, )	DISTRIBUTION
deceased.	

Now comes J. H. Merriam, the administrator with the will annexed of the estate of Jeanette Fensky, deceased, and by leave of Court first had and obtained, files his supplemental petition for distribution of said estate, and alleges:

Letters of administration with the will annexed were duly issued upon said estate on the —— day of August, 1908.

Notice to creditors has been duly published, the first publication thereof having been made on the —— day of August, 1908.

An inventory and appraisement of said estate was duly returned and filed on the —— day of September, 1908, showing said estate to be of the value of \$3509.38.

All claims presented and allowed against said estate have been fully paid as shown by the foregoing account.

Said estate is now in condition to be finally settled and distributed.

The following named persons are the next of kin and only heirs at law of said deceased, to wit: Eugene Wellke, brother, of the age of — years, residing at Pasadena, California; Alma J. Schmidt, sister, of the age of — years, residing at Los Angeles, California; and Amanda Katzung, sister, of the age of — years, residing at San Luis Obispo.

By the terms of the last will of said deceased duly admitted to probate herein, certain property belonging to said deceased and situated in the state of Kansas. was devised and bequeathed to certain persons named in said will and described as the nieces and nephews of the deceased husband of said deceased, and the duly authenticated copy of said will was probated in the said state of Kansas by M. L. Campbell, the executor named in said will; and as your petitioner is informed and believes, the property located in Kansas has been in that proceeding administered upon and distributed under the provisions of said will.

That the property administered upon in this proceeding was situated in the State of California at the time of the death of said deceased, and is not disposed of by the terms of said will, and is therefore distributable to the said heirs of said deceased in equal shares.

That during the last illness of said deceased, to wit; on or about October 10, 1907, by a certain instrument

in writing, the said Jeanette Fensky gave to Laura Coughlin residing at Rose Hill, in said Los Angeles County, and being of full age, and being the niece of the deceased husband of said Jeanette Fensky, a certain note then owned by said Jeanette Fensky, for the sum of \$200.00. That subsequently and before the death of Jeanette Fensky, but while she was too ill to give the matter competent attention, the said note was paid by the maker thereof, and the proceeds thereof mingled with the other funds of said Jeanette Fensky, the residue of which is included in the property administered upon in this proceeding. That it was the intention of said Jeanette Fensky to make a gift causa mortis to the said Laura Coughlin of \$200.00, and that said gift was never revoked, and that the heirs of said deceased above mentioned have in writing agreed to treat such gift as a valid gift causa mortis for the sum of \$200.00 to the said Laura Coughlin, and to the payment of the same to her in cash out of the said balance remaining in the hands of the said administrator in order to carry out in good faith the purpose of said deceased as indicated by said document.

The said heirs being the brother and sisters of said deceased, the full amount distributable to each of them from said estate, comes within the exemption provided in the collateral inheritance tax law.

WHEREFORE said administrator prays that a decree of distribution be made distributing the said remainder of said estate to the persons entitled thereto, and authorizing and directing said administrator to pay in cash out of said residue in his hands the sum of

\$200.00 to the said Laura Coughlin, and that the balance of said estate be distributed to the three heirs above named in equal shares or interests, and for all other proper relief.

J. H. Merriam. Administrator with the will annexed  
of the estate of said deceased.

In pro per.

STATE OF CALIFORNIA.           )  
County of Los Angeles,         ) ss.

J. H. Merriam, being first duly sworn, upon his oath states that he is administrator C. T. A. in the above entitled proceeding; that he has heard read the within and foregoing supplemental petition for distribution and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

J. H. Merriam.

Subscribed and sworn to before me this 11th day of  
Sept., A. D., 1909.

C. G. KEYES, Clerk. By W. L. Warren, Deputy.  
Endorsed: FILED Sept. 11, 1909. C. G. KEYES,  
Clerk. By W. L. Warren, Deputy. Further endorsed:  
Los Angeles, Cal. Sept. 11, 1909.

The hearing of the within Supplemental Petition for final distribution is hereby set for the 22nd day of Sept. 1909, at 10 o'clock A. M. in Dep't. 2 of the Superior Court of Los Angeles County, California.

C. G. Keyes, Clerk. By W. L. Warren, Deputy.

The defendants offered in evidence a document from the files of the said Jeanette Fensky estate entitled "Notice of settlement of final account and hearing of petition for distribution. Affidavit of posting".

Counsel for plaintiffs: To that we object on the ground that it is incompetent, irrelevant and immaterial, and the particular point with reference to the general objection is that it is not a notice of hearing of that petition. It is a purported notice that the petition will be heard on the 22nd day of July, 1909, whereas the petition itself was filed on September 8, 1909, and the notice is dated September 8, 1909.

Objection overruled and exception noted. The said document was received in evidence and marked Defendants' Exhibit X, and is as follows:

IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA IN AND FOR THE  
COUNTY OF LOS ANGELES.

In the matter of the	)	Notice of settlement of final
estate of Jeanette Fen-	)	account and hearing of pe-
sky, Deceased.	)	tition for distribution.

Notice is hereby given that the account of J. H. Merriam as Admr with will annexed of the estate of Jeanette Fensky, deceased, for the final settlement of said estate has been rendered for settlement; that a petition for final distribution of said estate was filed with said account; that the 22nd day of July, 1909, has been appointed as the day for the settlement of said account and the hearing of said petition for final distribution; and that said matters will be heard at the Court Room



of Department 2 of the Superior Court of Los Angeles County, California.

Dated Sept. 8, 1909.

C. G. KEYES, County Clerk.

By C. B. Glase, Deputy Clerk.

On reverse side:

STATE OF CALIFORNIA	) ss	Affidavit of
County of Los Angeles.	)	Posting.

C. B. Glase being duly sworn, says that on the 10th day of Sept. A. D., 1909, at the request of the Clerk of the Superior Court of the County of Los Angeles, he posted three notices, of which the foregoing is a copy, in three of the most public places in the said County of Los Angeles, to wit: One of the said notices at the County Clerk's office, one at the County Recorder's office and one at the place where the said Superior Court is held in the City of Los Angeles.

C. B. GLASE.

Subscribed and sworn to before me this 10th day of Sept. A. D., 1909.

C. G. Keyes, County Clerk.

By W. L. Warren, Deputy.

Endorsed: FILED Sept. 11, 1909.

C. G. KEYES, Clerk. By W. L. Warren, Deputy.

The defendants offered in evidence the order settling final account and for distribution in the said Jeanette Fensky estate.

The plaintiffs objected to the introduction of said order upon the ground that the same was incompetent, irrelevant and immaterial; that the proper foundation

was not laid; that notice of hearing of the petition was not given and that the decree upon its face and upon the record already introduced is invalid.

Objection overruled and exception noted. The said document was received in evidence and marked Defendants' Exhibit Y, and is as follows:

Be it remembered that on the 22nd day of Sept., 1909, in Department 2 of the Superior Court of the County of Los Angeles, State of California, Hon. James C. Rives, Judge, Presiding; present Mr. W. L. Warren, Deputy Clerk, the following proceedings were had, to wit:

IN RE ESTATE OF JEANETTE FENSKY, Dec'd.  
No. 13286 ORDER SETTTLING FINAL ACCOUNT  
AND FOR DISTRIBUTION.

The final account and petition for distribution herein, and supplemental petition of J. H. Merriam, the administrator with the will annexed of said estate, coming on regularly this day for settlement and hearing, and no person appearing to except to or contest said account or said petitions, the Court after hearing the evidence settles said account and orders distribution of said estate as follows: It is ordered, adjudged and decreed by the court that said J. H. Merriam as such administrator has in his possession belonging to said estate, after deducting the credits to which he is entitled, a balance of \$1956.84, of which \$906.84 is in cash, and the remainder consists of the promissory note described in said petition at the value of the appraisal, and that said account be allowed and settled accordingly; that said deceased left surviving as her only

heirs at law the following brother and sisters, to wit; Eugene Wellke, Alma J. Schmidt and Amanda Katzung; that the aforesaid balance of cash and said note, and all other property belonging to said estate, whether described herein or not, be distributed as follows: The sum of \$200.00 in cash to Laura Coughlin, niece of the deceased husband of said Jeanette Fensky, deceased, as a gift causa mortis, in compliance with the instrument in writing filed herein; and all the rest of the property of said estate, share and share alike, to said above named brother and sisters of said decedent.

The defendants offered in evidence the final discharge of J. H. Merriam, administrator of the said estate.

The plaintiffs objected upon the same grounds last stated. Objection overruled and exception noted.

The same was received in evidence and marked Defendants' Exhibit Z, and is as follows:

IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA IN AND FOR THE COUNTY  
OF LOS ANGELES.

In the matter of the es- )	Final Discharge of
tate of Jeanette Fensky, )	J. H. Merriam,
Deceased. )	Admr. c. t. a.

It appearing to the satisfaction of the Court that J. H. Merriam, the administrator with the will annexed of the estate of Jeanette Fensky, deceased, has performed all the acts lawfully required of him as such administrator.

IT IS ORDERED, ADJUDGED AND DECREED, that said J. H. Merriam, be discharged from all further

duties and responsibilities as such administrator c. t. a. and he and his sureties are hereby released from any liability to be hereafter incurred.

Done in Open Court this 13th day of October, 1909.

Frederick W. Houser, Superior Judge.

Endorsed: FILED Oct. 13, 1909.

C. G. KEYES, Clerk. By H. H. Doyle, Deputy.

It was stipulated that J. H. Merriam was duly and regularly appointed administrator with the will annexed of the estate of Jeanette Fensky, deceased, and that he duly qualified as such.

The defendants offered in evidence a petition for authority to endorse water stock in the said Jeanette Fensky estate which was received in evidence and marked Defendants' Exhibit A-1. The same is as follows:

IN THE SUPERIOR COURT OF LOS ANGELES  
COUNTY, STATE OF CALIFORNIA.

In the matter of the ) PETITION FOR AU-  
estate of JEANETTE ) THORITY TO ENDORSE  
FENSKY, deceased. ) WATER STOCK.

To the Honorable, the Superior Court of Los Angeles County, California:

GREETING:

The petition of J. H. Merriam, administrator of the estate of said deceased, respectfully shows

-I-

That as your petitioner is informed and believes the above named Jeanette Fensky, deceased, during her life time transferred to one Alma J. Schmidt, certain land



near Rialto, San Bernardino County, California. That certain stock in the Lytle Creek Water & Improvement Company appurtenant to said land and necessary to its use, to wit: ten (10) shares thereof evidenced by certificate No. 1439, was intended by said Jeanette Fensky, to be transferred to said Alma J. Schmidt, and the possession of said certificate therefor was transferred to said Alma J. Schmidt with said deed, but that said certificate had not been endorsed by said Jeanette Fensky since deceased.

—II—

That the heirs of said Jeanette Fensky to whom that portion of her estate, which is situated in California, was distributable, are Amanda Katzung, sister, of full age, and now residing at San Luis Obispo, California; Eugene Wellke, brother, of full age, residing at Pasadena, California; and the said Alma J. Schmidt, sister, of full age, now residing at Los Angeles, California.

—III—

That the said Amanda Katzung and Eugene Wellke have by memorandum in writing and signed by them as heirs of said deceased, admitted the facts set forth in paragraph I above, and consented to and authorized the endorsement of said certificate in favor of said Alma J. Schmidt.

That the claimants against said estate whose rights might be affected in any way by the transfer of said stock having in writing consented to and authorized the endorsement of said certificate in favor of said Alma J. Schmidt.



WHEREFORE your petitioner prays that an order be made and entered by said Court in the above entitled proceeding, authorizing your petitioner as administrator of said estate, to endorse the said certificate in favor of said Alma J. Schmidt. And that such other and further order may be made as is meet in the premises.

And your petitioner will ever pray.

Dated March 25th, 1909.

J. H. MERRIAM, Administrator with the will annexed  
of the estate of Jeanette Fensky, deceased.

(Duly verified)

Endorsed: FILED Mar. 25, 1909.

C. G. KEYES, Clerk. By W. L. Warren, Deputy.

The defendants offered in evidence the order authorizing administrator to endorse water stock in the said Jeanette Fensky estate which was received in evidence and marked Defendants' Exhibit B-1, and is as follows:

IN THE SUPERIOR COURT OF LOS ANGELES  
COUNTY, STATE OF CALIFORNIA.

In the matter of the )	ORDER AUTHORIZING
estate of Jeanette )	ADMINISTRATOR TO
Fensky, deceased. )	ENDORSE
	WATER STOCK.

Now on this 25th day of March, 1909, this matter came on regularly for hearing upon the petition of the administrator for an order of Court authorizing him to endorse ten (10) shares of the capital stock in the Lytle Creek Water & Improvement Company, evidenced by certificate No. 1439, then standing in the name of

Jeanette Fensky, deceased, to and in favor of Alma J. Schmidt.

And it appearing that said deceased during her life time transferred to said Alma J. Schmidt certain land near Rialto, San Bernardino County, California, and that said stock was appurtenant to said land and necessary to its use, and was intended by said deceased to be transferred to said Alma J. Schmidt, and the possession of said certificate therefor was transferred to said Alma J. Schmidt with the deed for said land, but had not been endorsed by said deceased, and that the heirs of said Jeanette Fensky to whom that portion of her estate, which is situated in California, was distributable, and the creditors of said estate and all persons, whose interests would be affected by the desired endorsement, have in writing consented to, and authorized such endorsement.

NOW THEREFORE it is by the Court here ordered and decreed that J. H. Merriam as administrator of said estate be, and he is hereby authorized to endorse the said certificate for ten (10) shares of the capital stock of the Lytle Creek Water & Improvement Company, evidenced by Certificate No. 1439, to and in favor of said Alma J. Schmidt.

Dated March 25, 1909.

James C. Rives, Judge of said Superior Court.

Endorsed: FILED Mar. 25, 1909.

C. G. KEYES, Clerk. By W. L. Warren, Deputy.

The defendants offered in evidence the order appointing appraisers in the said Jeanette Fensky estate,

dated August 31, 1909, and filed Sept. 1, 1909, whereby Ira J. H. Sykes, J. L. Attebury and A. H. Todd were appointed appraisers to appraise the said estate.

The defendants offered in evidence from the record of the said Jeanette Fensky estate the following document which was received in evidence and marked Defendants' Exhibit D-1. The same is as follows:

Phones. (Both 1141, office.

(Home 1270, residence.

Notary Public.

J. H. MERRIAM, Attorney and Counsellor at Law,

Union Savings Bank Building.

Pasadena, Calif. Aug. 12/09.

The undersigned heirs of the estate of Jeanette Fensky, deceased, hereby agree that \$350 is a reasonable amount to be allowed to J. H. Merriam for his work as attorney in connection with the settlement of said estate in addition to the regular commission as Administrator, as provided by the agreement heretofore made between us and said J. H. Merriam and we hereby consent that the court shall allow the said sum for such attorney's fees -- and give credit to said administrator for said sum in his final account as such.

Alma J. Schmidt, By H. H. Schmidt, her attorney in fact.

Amanda Katzung, By William Thompson, her attorney in fact.

Eugene Wellke, per Minnie S. Farnsworth.

Endorsed: FILED Sept. 22, 1909.

C. G. KEYES, Clerk. By W. L. Warren, Deputy.

The defendants offered in evidence a certified and authenticated copy of the proceedings in the District

Court of Shawnee County, Kansas, in an action entitled Louise Pickens and Johanna Schutt, plaintiffs, vs M. T. Campbell, Thomas Page and E. C. Arnold, defendants.

The plaintiffs objected to the introduction of the same upon the ground that it was incompetent, irrelevant and immaterial and entirely outside the issues of the case; that the record as offered was not binding upon and would not inure to the benefit of any of the parties to this action.

The Court: At this time I can see no sound basis for holding that this is *res judicata* between the parties, and conclusive between them, except in so far as it may have the tendency to illustrate, if it does illustrate, the meaning or the applicability of the decisions of the Supreme Court of Kansas. Now, for that purpose, being a very limited one, it would seem to be proper to have it before the court. It will be overruled.

The said certified and authenticated copy was received in evidence and marked Defendants' Exhibit E-1. The same is as follows:

IN THE DISTRICT COURT OF SHAWNEE,  
COUNTY, KANSAS.

Louisa Pickens and  
Johanna Schutt,                      Plaintiffs.

vs.

No. 28758.

M. T. Campbell, Thomas Page  
and E. C. Arnold,              Defendants.

P E T I T I O N.

The plaintiff, Louisa Pickens resides in Topeka, Shawnee County, Kansas, and the plaintiff, Johanna Schutt resides in Omaha, Nebraska.



For their cause of action against the defendants, the plaintiffs say:

I.

That Ferdinand Fensky died intestate without issue in San Pedro, California, on August 7, 1903, and at the time of his death owned, among other property, promissory notes due from others, amounting in value to about Twenty Thousand Dollars, a large portion of which notes were secured by liens on real estate situated in Shawnee County, Kansas; and also owned cash then in the hands of the defendant, M. T. Campbell, in Shawnee County, Kansas, to the amount of more than \$4,297.14, and also owned real estate in the State of California of the value of more than Twenty Five Thousand Dollars; and also owned real estate in Shawnee County, Kansas.

II.

That by the laws of the State of California in force at the time of his death the property of the said intestate situated in the State of California descended, one half to his widow, Jeanette Fensky, and the other half to his brothers and sisters then alive, whose names were as follows: a sister, Ida Wendt, a brother, Frederick Fensky, a sister Augusta Krauss, a sister, Huldah Richter, a brother Charles Fensky, and George Fensky, a son of another brother, and the plaintiffs, who were sisters of the said intestate.

III.

That in his life time the said intestate then the owner of certain real estate in the City of Topeka, and near thereto, sold the same to various persons, giving to the

vendees contracts for deeds to be delivered to said vendees upon the payment by them of the full amount of the purchase price of said real estate; and, sometime before his death the said intestate signed deeds naming as grantees therein the vendees in said contracts; that at the time of his death said deeds were not delivered and were not deliverable until the terms of said contracts had been performed by said vendees; that said real estate covered by said contracts is partially described as follows:

What is known as Fensky's Addition to the City of Topeka; also about twelve acres in Reserve No 5 in Shawnee County; also lot 61 on Kansas Avenue, South in the City of Topeka; and also part of lot 71 on Kansas Avenue, in North Topeka, Kansas.

For want of information and access to said contracts the plaintiffs are unable to give a more particular description thereof and of the real estate covered thereby and of the terms of sale and the amount of the purchase price, but plaintiffs aver that the unpaid balance of the purchase money under said contracts due to said intestate at the time of his death amounted to more than Twenty Thousand Dollars exclusive of interest.

#### IV.

That on September 9, 1903, the defendant, M. T. Campbell was appointed by the Probate Court of Shawnee County Kansas, administrator of the estate of said intestate and on that day qualified as such administrator and filed his administrator's bond in the sum of Eight Thousand Dollars conditioned for the faithful performance of his duties as administrator, with the

defendants, Thomas Page and E. C. Arnold as sureties on said bond.

V.

That on October 26, 1903, the defendant, Campbell, filed in said Probate Court a pretended inventory and appraisal of the property of said intestate to be administered by him; that in said inventory the defendant, Campbell, listed and he caused to be appraised twenty three promissory notes, some of which were secured by mortgages, appraised at a valuation of \$16,630.50, and also listed as property of said intestate cash in the hands of said Campbell in the sum of \$4,297.14. That from time to time the defendant Campbell collected from the makers of said notes considerable sums of money, so that about the month of July 1904, he had in his hands cash belonging to the said estate in excess of Ten Thousand Dollars; that out of the funds in his hands as such administrator and belonging to said estate the defendant Campbell paid to each of the brothers and sisters above named the sum of \$1000.00 and secured from each of said brothers and sisters a writing executed by them purporting to be a quitclaim deed and release in favor of the said Jeanette Fensky, widow of the said Ferdinand Fensky, quitclaiming and releasing in favor of said widow all of the right, title and interest of the said brothers and sisters, respectfully, in and to the estate of the said intestate, both real and personal; that said deeds of release and quitclaim so obtained by the said Campbell by the use of funds in his hands as such administrator were by him delivered to said widow and by her used as evi-

dences of her right to all and singular the estate of the said intestate both in California and in Kansas.

#### VI.

That the above named Jeanette Fensky was by the consideration of the Superior Court of Los Angeles County, California, a court having probate jurisdiction, appointed administratrix of the estate of the said intestate soon after his death, and having qualified as such, caused an inventory of said estate to be filed and, after having received from the said Campbell said deeds of release and quitclaim, represented to said Superior Court that she was the only person interested in said estate and thereby caused said estate to be closed and all of the assets thereof, amounting in actual value to about Seventy Thousand Dollars, to be delivered to her.

#### VII.

That on or about April 26, 1905, the defendant, Campbell, filed in the Probate Court of Shawnee County, Kansas, a pretended final account of his administration of said estate and therein averred that the inventory filed by him of monies, notes and mortgages, represented all the property belonging to said estate distributable among the heirs of said intestate, and that the said Jeanette Fensky had purchased the right title and interest of the other heirs and that she was at that time the sole owner of all of the estate left by said intestate, and the only heir interested in the settlement thereof, and represented that said estate was then in condition to be closed. That said Campbell further averred in said pretended final account



that he had charged himself with all the personal property of said intestate and was ready to turn over the same to the said Jeanette Fensky, and presented with said pretended final account a pretended statement of his disbursements in behalf of said estate; and by means of said pretended final account and the averments therein contained the said Campbell procured said Probate Court to enter an order approving said pretended final report and discharging the said Campbell as administrator and relieving the sureties on his bond from further obligation in the premises, upon the filing by the said Campbell of a receipt from the said Jeanette Fensky for the monies, notes and mortgages in his hands belonging to said estate; and thereafter the said Campbell filed said receipt of the said Jeanette Fensky for said monies, notes and mortgages, and thereupon on or about the —— day of June, 1905, an order was entered by said probate Court purporting to finally close and settle the estate of the said intestate.

#### VIII.

That immediately upon the death of said intestate the said Jeanette Fensky came into possession of said notes, contracts and deeds owned by the said intestate, and the said Campbell was fully informed that the said Jeanette Fensky held the same; and prior to the time of his appointment the said Campbell was duly informed that the said Jeanette Fensky held said notes and said contracts as the property of said intestate and knew that said deeds had not been delivered; that so far as the plaintiffs have been able to ascertain the vendees in said contracts are as follows: George



Brosamer, M. G. Tracy, Camille Van Laeys, E. H. Stamin, Benjamin Dustin, George Lippert, W. L. Havens, Joseph Walker, Reed Saylor, Louis Schaffer, Frank Sawyer, Frank Gutch, John Sell, Jacob Fink, George Jammer, Mollie Grant, John Domme; G. A. Baxter, Henry Frank, Casper Getty, (assignee of Mike Etzel), Wesley Sagar (assignee of Maurice Sawyer), John Dietz, J. B. Gibbon and Gus Hammrick; that the said Campbell notwithstanding he was such administrator acted as the agent and representative of the said Jeanette Fensky and in her interest concealed from the other heirs at law and particularly from these plaintiffs the existence of such contracts and advised said Jeanette Fensky to conceal their existence and purposely omitted to list the same in said inventory; that in collusion with the said Jeanette Fensky and with her full knowledge and consent, and well knowing that the plaintiffs and other heirs at law knew nothing of the existence of such contracts, the said Campbell, contriving to deprive the plaintiffs of their share of the estate, used the money in his hands to procure from plaintiffs and the other heirs at law said releases and deeds, and to induce the plaintiffs to execute said releases, represented to them, through said inventory and otherwise, that the entire amount of the estate distributable among said heirs amounted to about Twenty Thousand Dollars (of which they would receive one half); that the money consideration for such releases would be advanced by said Jeanette Fensky; that said real estate had not been sold and by law passed to said widow, and said brothers and sisters had no interest

therein; and, that in no event would the shares of said brothers and sisters if all of said assets were collected, amount to more than one thousand dollars; that the plaintiffs believed said representations and were induced thereby to execute said releases and accept the sum of one thousand dollars each, paid to them as consideration therefor. Plaintiffs aver that said representations were untrue, for that, in truth and in fact, said estate distributable among said heirs, amounted in value to more than Seventy Thousand Dollars; that in truth and in fact said notes and mortgages were all good and afterwards were collected; that in truth and in fact plaintiff's distributive shares of said estate exceeded \$4000.00 to each of them; and that in fact the money offered to be paid and paid for said releases was then in said Campbell's hands as assets of said estate; that the said widow and the said Campbell, and each of them, knew that said representations were untrue and knew the facts to be as herein stated; and knew also that said real estate had been sold and that the unpaid purchase money ~~purchase money~~ therefor constituted personal assets of said estate, distributable among said brothers and sisters that said contracts of sale were not recorded and all knowledge of their existence was sedulously and designedly kept from the said brothers and sisters by the said Jeanette Fensky and the said Campbell, and, for the purpose of further misleading and deceiving said brothers and sisters the said Jeanette Fensky and the said Campbell represented to one at least of said

brothers that during his life time the said Ferdinand Fensky had sold said Fensky's Addition and received the money therefor, and had executed and delivered deeds therefor; that after the death of the said intestate and for the purpose of further misleading and deceiving said brothers and sisters and each of them, the said Campbell and the said Jeanette Fensky caused said undelivered deeds, then in their possession, to be recorded in the office of the Register of Deeds of Shawnee County, Kansas, and prevailed upon the vendees in said contracts to execute to the said Jeanette Fensky mortgages for the amount of unpaid purchase money due from said vendees at the time of the execution of such mortgages, and said mortgages were by the said Campbell omitted from said estate and turned over to the said Jeanette Fensky and by her converted to her own use; that in truth and in fact the deeds so recorded were signed by the said intestate but remained in his possession, awaiting the performance by the vendees of the conditions of said contracts, and the unpaid purchase money due from said vendees was a part of the personal estate of the said intestate, distributable as such among said brothers and sisters.

IX.

That there came into the hands of the said Campbell as a part of the property of the said intestate other notes payable to said intestate, than those inventoried by the said Campbell; that plaintiffs' advices are that one of these notes was made by one Stein, for one thousand dollars, and other of said notes was made by

one Simms; that neither of said notes were disclosed to the brothers and sisters of said intestate, but were omitted from said inventory and concealed by said Campbell for the benefit of the said Jeanette Fensky, and that the proceeds of the same were collected and paid over by the said Campbell to the said Jeanette Fensky; that the said Jeanette Fensky died at Pasadena, California, on July 9, 1908, unmarried and without issue, leaving a will by which she undertook to dispose of a part only of the property standing in her name and in her possession; that the said Campbell was appointed by the Probate Court of Shawnee County, on October 9, 1908, as administrator with the will annexed, of the estate of the said Jeanette Fensky: that he has qualified as such administrator with the will annexed and said estate of Jeanette Fensky, deceased, is now in course of administration by him; that according to said inventory the estate of the said Jeanette Fensky now in course of administration in said Probate Court amounts to about the sum of Five Thousand Dollars.

## X.

These plaintiffs aver that neither of them had any knowledge whatever of the existence of said contracts of sale nor of any balances of unpaid purchase money due to said estate, nor of the real value of the California real estate, nor of any of the other matters, things and property omitted from said inventory, nor any means of knowing such facts, until after July, 1912, and, ever since the discovery in July, 1912, of



the aforesaid frauds and misrepresentations, and of the existence of said omitted assets, these plaintiffs have diligently endeavored to secure precise information concerning the amount due the estate of the said Ferdinand Fensky, deceased from the vendees in said contracts of sale, but have not been able to do so, except that from the information plaintiffs have been able to obtain, they aver that such amount exceeds Twenty Thousand Dollars. Plaintiffs further aver that since the discovery of said frauds and omissions, in July, 1912, they have diligently endeavored to secure sufficient data and information to state the account between them and the estate of the said Jeanette Fensky and the said Ferdinand Fensky, and the said Campbell, but have been unable to do so, except as hereinbefore stated, and these plaintiffs at this time are not fully advised of all of the assets and property owned by the said Ferdinand Fensky at the time of his death.

#### XI.

That as sisters of said Ferdinand Fensky, deceased, each of the plaintiff was and is entitled to one sixteenth of his estate, (except the Kansas real estate) and upon a lawful distribution thereof each of the plaintiffs would receive not less than \$4000.00; that the whole amount actually received by each of the plaintiffs is the sum of One Thousand Dollars paid by the said Campbell, acting for said Jeanette Fensky, as the consideration for said deeds and releases; and by reason of the premises, said Campbell is liable to the plaintiffs for the remainder of their shares of said estate.

WHEREFORE, The plaintiffs pray that the pretended final settlement made by the said Campbell as administrator of the estate of Ferdinand Fensky be adjudged fraudulent and void, and that the same be set aside and held for naught; that the said Campbell be required to fully account to the plaintiffs for their distributive shares of all of the estate of the said Ferdinand Fensky, which came into his hands and for which he was liable as such administrator, and that the same be administered according to law; that an account be taken and stated of the property and assets of the said Ferdinand Fensky, and that it be adjudged that each of the plaintiffs herein is entitled to an undivided one-sixteenth ( $1/16$ ) of such property; and, that upon final hearing this court render judgment in favor of the plaintiffs and against the said Campbell for such amount as may be found to be due them by reason of the premises, and against the defendant, Thomas Page, and the defendant, E. C. Arnold, as sureties for the payment of such sum.

The plaintiffs further pray that this court adjudge that said deeds and releases executed by these plaintiffs to the said Jeanette Fensky are not binding upon these plaintiffs, and as between plaintiffs and said Campbell, are wholly void and of no effect as receipts or otherwise.

And the plaintiffs pray for such other and further relief as may be consistent with the principles of equity.

D. R. Hite

Attorney for plaintiffs.

The Clerk of the above entitled court will please issue a summons for the defendants above named, directed to the Sheriff of Shawnee County, Kansas, and returnable according to law.

D. R. Hite

Attorney for plaintiffs.

Filed May 15, 1914

C. W. Bower

Clerk District Court.

### EXHIBIT "A".

BOND OF ADMINISTRATOR,  
KNOW ALL MEN BY THESE PRESENTS:

That We M. T. Campbell as principal and Thomas Page and E. C. Arnold, as sureties, are held and firmly bound unto the State of Kansas, in the sum of Eight Thousand Dollars, to the payment of which, well and truly to be made, we bind ourselves, our executors and administrators, firmly by these presents.

Dated, signed and sealed by us, this 9th day of September, A. D., 1903.

THE CONDITION of the above obligation if such that, whereas, the above bounden M. T. Campbell has been duly appointed by the Probate Court in and for the County of Shawnee and State of Kansas, Administrator of the estate of Ferdinand Fensky, deceased.

NOW, if the said Administrator shall make and return into said Probate Court, on oath, within sixty days from this date, or sooner, if ordered by the Probate Judge, a true inventory of all moneys, goods, chattels, rights and credits of said deceased, which have

or shall come to his possession or knowledge, and also of the real estate of said deceased, and shall administer according to law all the moneys, goods, chattels, rights and credits of the said deceased, and the proceeds of all his real estate which may be sold for the payment of his debts, which shall at any time come to the possession of the administrator, or to the possession of any other person for him, and shall render upon oath a true account of his administration annually, and at any other times when required by said Probate Court or by the law; and shall pay any and all balances remaining in his hands upon the settlement of his accounts to such persons as said Probate Court or the law shall direct, and shall deliver the Letters of Administration into the court, in case any will of said deceased shall be hereafter proved and allowed, then this obligation to be void; else in full force and effect.

M. T. Campbell (Seal)

Thomas Page (Seal)

E. C. Arnold (Seal)

The above Bond taken and approved by me, this  
9 day of Sept. A. D. 1903.

R. F. Hayden

(SEAL)

Probate Judge.



IN THE DISTRICT COURT OF SHAWNEE  
COUNTY, KANSAS.

LOUISA PICKENS AND	)	
JOHANNA SCHUTT,	)	
PLAINTIFFS,	)	
VS.	)	NO. 28,758.
M. T. CAMPBELL, THOMAS PAGE	)	
AND E. C. ARNOLD.	)	
DEFENDANTS.	)	

SEPARATE ANSWER OF DEFENDANT,  
M. T. CAMPBELL.  
FIRST COUNT.

Comes now the above named defendant, M. T. Campbell, and for answer to plaintiffs' petition filed herein denies each and every, all and singular, the allegations and averments therein contained, except such as are hereinafter expressly admitted.

This defendant admits that on August 7, 1903, Ferdinand Fensky died in the State of California, and at that time was a resident of that State. That at the time of his death this defendant had in his possession about \$4,297.14 of money belonging to Ferdinand Fensky. That at the time of the death of Ferdinand Fensky he left surviving him his widow, Jeanette Fensky; Ida Wendt, a sister; Frederick Fensky, a brother; Augusta Krauss, a sister; Huldah Richter, a sister; Louisa Pickens, a sister; Johanna Schutt, a sister, Charles Fensky, a brother; and George Fensky, a nephew of Ferdinand Fensky, but left no living issue.

That on September 9, 1903, the defendant, M. T. Campbell, was appointed by the Probate Court of Shawnee County, Kansas, as administrator of the estate of said intestate in Kansas; and on that day qualified as such administrator, filed his administrator's bond in the sum of \$8,000.00, conditioned for the faithful performance of his duties as such administrator with his codefendants, Thomas Page and E. C. Arnold, as his sureties on said bond. That on October 26, 1903, this defendant filed in the Probate Court of Shawnee County an inventory and appraisal of the property of said intestate to be administered by him. That soon after the death of Ferdinand Fensky Jeanette Fensky, his widow, was appointed as administratrix of the estate of Ferdinand Fensky, deceased, in the State of California, qualified and entered upon her duties as such administratrix; that on April 26, 1905, this defendant filed in the Probate Court of Shawnee County a final account of his administration of said estate, which final report of said administrator was approved by said Court and said administrator was discharged upon filing certain receipts of the widow, Jeanette Fensky, which was accordingly done, and on the —— day of June, 1905, said estate of Ferdinand Fensky was finally settled and said administrator and his sureties discharged. That Jeanette Fensky, widow of Ferdinand Fensky, died testate in California, on July 9, 1908, unmarried, and without issue; that on October 9, 1908, defendant, M. T. Campbell, was appointed administrator of her estate by the Probate Court of

Shawnee County, which administration has not yet been closed.

### SECOND COUNT.

Defendant, M. T. Campbell, for a second and further defense to the cause of action set out in plaintiffs' petition says that plaintiffs are seeking in this suit to recover upon the ground of fraud, and that this suit was not commenced within two years prior to the alleged fraud complained of in their petition, and, therefore, is barred by the statute of limitations.

### THIRD COUNT.

Defendant, M. T. Campbell, for third and further defense to the cause of action set out in plaintiffs' petition says that the pretended cause of action therein stated accrued more than three years prior to the commencement of this suit, and, therefore, is barred by the statute of limitations.

### FOURTH COUNT.

Defendant M. T. Campbell, for fourth and further defense to the cause of action set out in plaintiffs' petition says that this suit was brought more than five years after said plaintiffs' pretended cause of action accrued, and, therefore, is barred by the statute of limitations.

### FIFTH COUNT.

Defendant, M. T. Campbell, for fifth and further defense to the cause of action set out in plaintiffs' petition says that on August 7, 1903, Ferdinand Fensky

died in the State of California; that on September 9, 1903, this defendant was appointed as administrator of the estate of Ferdinand Fensky, deceased, by the Probate Court of Shawnee County, Kansas; that thereupon he qualified, executed his bond in the sum of \$8,000.00, conditioned for the faithful performance of his duty as such administrator with his co-defendants, Thomas Page and E. C. Arnold, as sureties. That on October 26, 1903, he filed an inventory in said estate with the Probate Court of Shawnee County; that in said inventory he listed as a part of the estate of Ferdinand Fensky what was commonly known as Fensky's Addition to the City of Topeka, which addition had been regularly platted and laid out in lots and blocks and the streets and alleys had been dedicated to the public. That Ferdinand Fensky was selling the lots in this addition upon contracts and building houses or furnishing the money to purchasers of lots to build houses with, with the agreement and understanding that he would execute a deed to such purchasers when final payment was made upon said lots. That at the time of the death of Ferdinand Fensky he was the owner of a considerable number of lots in said addition that had not been disposed of and where sales had been made and had not been paid for in full, and that certain of said contracts so held came into the possession of this defendant. This this defendant believed and avers that the contracts that came into his possession, together with the lots covered by them, were real estate and not personal property, as claimed on behalf of plaintiffs.



Defendant further avers that these plaintiffs knew of the manner in which Ferdinand Fensky was handling this addition and knew that a number of these lots had not been fully paid for at the time of the death of Ferdinand Fensky. That long prior to the death of Ferdinand Fensky he had prepared and signed deeds to a number of purchasers holding contracts and had these deeds in his possession at the time of his death, and that this defendant used said deeds that had been so executed by Ferdinand Fensky merely for convenience, but that there was no purpose or intention on his part to defraud or injure plaintiffs by so doing. That this defendant believed that the proceeds arising from said contracts belonged to Jeanette Fensky, the widow of Ferdinand Fensky, as the sole heir of Ferdinand Fensky, deceased. That this defendant had no knowledge or information except what he had received through correspondence as to the amount of property owned by Ferdinand Fensky in the State of California nor as to its value, and made no representations to the plaintiffs as to the value of the California property of which Ferdinand Fensky died the owner. That for the purpose of settling said estate certain negotiations were entered upon by this defendant with the heirs of Ferdinand Fensky, and at that time the plaintiffs and a number of other heirs lived herein the City of Topeka and were fully advised of what the Fensky estate consisted of. That after an investigation on their part and being fully advised they agreed to accept from this defendant as administrator the sum of \$1,000.00 each, which was thereafter paid. That these

plaintiffs were fully advised of the character of the contracts held by this defendant and with full knowledge of what the Ferdinand Fensky estate consisted of, and agreed to accept the sum of \$1,000.00 each in full for their share of the Fensky estate. That they accepted said amount after a full investigation, and being fully advised as to the Fensky estate, which was being handled by this defendant. That said amount of \$1,000.00 was paid to each of said parties and they signed a release of all claims of every kind and character they might have against the estate of Ferdinand Fensky; that thereafter this defendant published a notice of the time that he would apply for his discharge as administrator of said estate and thereafter a full hearing was had in the Probate Court, and said Court being fully advised discharged this defendant and declared the estate of Ferdinand Fensky closed.

Defendant further avers that within less than one year from the time of the discharge of this defendant as administrator and on or about the ——— day of ———, 1905, these plaintiffs knew and then complained of the same wrongs of which they have set up in their petition herein, but that they took no steps whatever to open up said estate in the Probate Court nor to have this defendant's final discharge set aside.

WHEREFORE, this defendant prays that he may go hence without day and recover his costs herein.

J. B. Larimer

Hazen and Gaw

Attorneys for above named Defendant.

Leave to file the foregoing answer this 10th day of December, 1914, is hereby given.

George H. Whitcomb

Filed Dec. 10, 1914,

C. W. Bower,

District Judge.

Clerk of District Court.

IN THE DISTRICT COURT OF SHAWNEE  
COUNTY, KANSAS.

LOUISA PICKENS AND

JOHANNA SCHUTT,

PLAINTIFFS,

VS.

M. T. CAMPBELL, THOMAS PAGE

AND E. C. ARNOLD,

DEFENDANTS.

NO. 28,758.

MOTION TO REVIVE.

Comes now Donald A. Campbell, Administrator with the will annexed of the estate of M. T. Campbell, deceased, and respectfully represents to this Court that the above named defendant, M. T. Campbell, departed this life on the first day of March, 1915, in the City of Topeka; that afterwards and on the 6th day of March, 1915, Donald A. Campbell was appointed as administrator of the estate of M. T. Campbell, deceased, by the Probate Court of Shawnee County, Kansas; that thereafter and on the 8th day of March, 1915, he executed his bond, qualified and entered upon his duties and is now acting in that capacity.

WHEREFORE, said Donald A. Campbell moves the Court to revive this action in the name of Donald

A. Campbell, as Administrator with the Will annexed of the estate of M. T. Campbell, deceased.

J. B. Larimer

Hazen and Gaw

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Attorneys for Donald A. Campbell, as Administrator with the will annexed of the estate of M. T. Campbell, deceased.

Filed April 8, 1915,

C. W. Bower,

Clerk District Court.

BE IT REMEMBERED, That on the 10th day of April, A.D. 1915, in the Shawnee County District Court, Third Judicial District, State of Kansas, before the Honorable George H. Whitcomb, presiding Judge of the Second Division, it being at the April Term of said court, the following proceedings among others, were had, to wit:

Louisa Pickens and Johanna  
Schutt, Plaintiffs.

vs.

No. 28,758.

M. T. Campbell, Thomas Page      Second Division.  
and E. C. Campbell, Defendants.

### JOURNAL ENTRY.

NOW, on this 10th day of April, 1915, the motion to revive the above entitled action against Donald A. Campbell, as Administrator with the will annexed of the estate of M. T. Campbell, deceased, came on for hearing; plaintiffs appeared by D. R. Hite, their attorney, and defendants appeared by J. B. Larimer and Hazen & Gaw, their attorneys. And it appearing to the satisfaction of the court that during the pendency



of this suit M. T. Campbell departed this life testate, and that Donald A. Campbell was on the 6th day of March, 1915, appointed administrator with the will annexed of the estate of M. T. Campbell, deceased; and that this is a proper case to be revived in the name of said administrator.

IT IS, THEREFORE, ORDERED, That said action be, and is hereby revived in the name of Donald A. Campbell, as Administrator with the will annexed of the estate of M. T. Campbell, deceased. O. K., D. R. Hite, Hazen & Gaw.

IN THE DISTRICT COURT OF SHAWNEE  
COUNTY, KANSAS.

LOUISA PICKENS AND	)	
JOHANNA SCHUTT,	)	
	)	
PLAINTIFFS,	)	
VS.	)	NO. 28,758
	)	
DONALD A. CAMPBELL, AS AD-	)	
MINISTRATOR WITH THE WILL	)	
ANNEXED OF THE ESTATE OF	)	
M. T. CAMPBELL, DECEASED:	)	
THOMAS PAGE AND E. C.	)	
ARNOLD.	)	
DEFENDANTS.	)	

SEPARATE ANSWER OF DEFENDANT,  
DONALD A. CAMPBELL, AS ADMINIS-  
TRATOR WITH THE WILL ANNEXED  
OF THE ESTATE OF M. T. CAMPBELL,  
DECEASED.

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FIRST COUNT.

Comes now the above named defendant, Donald A. Campbell, as administrator with the will annexed of

the estate of M. T. Campbell, deceased, and for answer to plaintiffs' petition filed herein denies each and every, all and singular, the allegations and averments therein contained, except such as are hereinafter expressly admitted.

This defendant admits that Ferdinand Fensky died intestate and without issue in San Pedro, California, on August 7, 1903; that on September 9, 1903, M. T. Campbell was appointed by the Probate Court of Shawnee County, Kansas, as administrator of the estate of said intestate, and on that day qualified as such administrator, filed his bond in the sum of \$8,000.00, conditioned for the faithful performance of his duties as administrator with the defendants, Thomas Page and E. C. Arnold, as sureties on said bond. That on October 26, 1903, M. T. Campbell filed in the Probate Court of Shawnee County an inventory and appraisement of the property of Ferdinand Fensky, deceased, to be administered by him; that in said inventory the defendant, M. T. Campbell, listed and caused to be appraised twenty-three promissory notes, some of which were secured by mortgage, and appraised at a valuation of \$16,630.50, and also listed as property of said Ferdinand Fensky, deceased, cash in the hands of said M. T. Campbell in the sum of \$4,297.14; that on April 26, 1905, M. T. Campbell filed in the Probate Court of Shawnee County, Kansas, a final account of his administration of said estate, that on the 6th day of June, 1905, an order was entered by said Probate Court finally closing and settling the estate of said

Ferdinand Fensky, deceased, and discharging M. T. Campbell, as administrator.

### SECOND COUNT.

This defendant for second and further answer to plaintiffs' petition says that in the administration of the estate of Ferdinand Fensky, deceased, M. T. Campbell acted in good faith in the handling and settling of said estate. That there came into his hands as administrator certain contracts for the sale of real estate entered into between Ferdinand Fensky and a number of persons to whom Ferdinand Fensky had sold lots and land upon contract, by the terms of which the purchasers were to pay a small amount down and then to make monthly payments on said contract until the full amount of the agreed price was paid, at which time Ferdinand Fensky was to execute to said purchasers a warranty deed for said property. That there was a forfeiture clause in said contracts by the terms of which if the purchaser should fail or neglect to make payments promptly that Ferdinand Fensky was authorized to declare a forfeiture of said contract and take back said real estate. That a number of these contracts came into the possession of M. T. Campbell, as administrator, and the question arose as to whether M. T. Campbell should list said contracts as personal property of the estate of Ferdinand Fensky, deceased, or should treat the contracts and the lots and land covered by the contract as real estate. That M. T. Campbell was at the that time a practicing lawyer herein the City of Topeka, Kansas, and had been for more than

thirty years; that after a full and careful investigation M. T. Campbell arrived at the conclusion that these contracts, together with the lands and lots they covered, were a part of the real estate of Ferdinand Fensky, at his death and should be so treated in the administration of said estate, and that by reason of their being real estate they passed under the law of Kansas to Jeanette Fensky, widow of Ferdinand Fensky, deceased; that said M. T. Campbell did not believe that said real estate contracts should be administered by him as a part of the personal property of the estate of Ferdinand Fensky. That said M. T. Campbell took this question up with John V. Goodrich, an attorney in San Pedro, California, who was representing the estate of Ferdinand Fensky in California; that said attorney agreed with Mr. Campbell that said contracts, together with the lots and land they covered, constituted real estate belonging to Ferdinand Fensky, deceased, at the time of his death and were not personal property subject to administration in Shawnee County, Kansas, as a part of the estate of Ferdinand Fensky, deceased; that M. T. Campbell acting upon such belief, supported by the opinion of John V. Goodrich, did not inventory said contracts as a part of the personal property of Ferdinand Fensky, deceased. That if M. T. Campbell was mistaken in his conclusion as to whether these contracts should be administered by him as though personal property, then it was by reason of his being mistaken in the law governing this class of property and not for the purpose of cheating



or defrauding plaintiffs herein out of any interest or right they might have in the estate of Ferdinand Fensky, deceased, by reason of their being his sisters and entitled to inherit under the law of the State of California; and therefore neither M. T. Campbell nor his bondsmen should be held for his misconstruction of the law of descent and distribution, if he was so mistaken.

### THIRD COUNT.

This defendant for third and further defense to plaintiffs' petition says that the pretended cause of action stated in plaintiffs' petition accrued more than two years prior to the bringing of this suit and, therefore, is barred by the statute of limitations and no recovery can be had thereon.

### FOURTH COUNT.

This defendant for fourth and further defense to the cause of action stated in plaintiffs' petition says that the pretended cause of action therein stated accrued more than five years before the commencement of this suit and, therefore, is barred by the five year statute of limitations.

WHEREFORE, defendant prays that he may go hence without day and recover his costs herein laid out and expended.

J. B. Larimer

Hazen and Gaw

Attorneys for Defendant Donald A.  
Campbell, as Administrator, etc.

Leave to file the within Answer out of time given this  
21st day of September, 1916.

George H. Whitcomb,  
District Judge.

Filed September 22, 1916,  
C. W. Bower,  
Clerk District Court.

IN THE DISTRICT COURT OF SHAWNEE  
COUNTY KANSAS.

LOUISA PICKENS AND	)	
	)	
JOHANNA SCHUTT,	)	
PLAINTIFFS,	)	
	)	
VS.	)	NO. 28,758.
DONALD A. CAMPBELL, AS AD-	)	
MINISTRATOR WITH THE WILL	)	
ANNEXED OF THE ESTATE OF	)	
M. T. CAMPBELL, DECEASED:	)	
THOMAS PAGE AND E. C.	)	
ARNOLD.	)	
DEFENDANTS.	)	

SEPARATE ANSWER OF DEFENDANTS,  
THOMAS PAGE AND E. C. ARNOLD.

FIRST COUNT.

Come now the above named defendants, Thomas  
Page and E. C. Arnold, and for separate answer to  
plaintiffs' petition filed herein deny each and every,  
all and singular, the allegations and averments therein  
contained, except such as are hereinafter expressly  
admitted.

These defendants admit that Ferdinand Fensky died  
intestate and without issue in San Pedro, California,

on August 7, 1903; that on September 9, 1903, M. T. Campbell was appointed by the Probate Court of Shawnee County as administrator of the estate of said intestate, and on that day qualified as such administrator, filed his bond in the sum of \$8,000.00, conditioned for the faithful performance of his duties as administrator with these defendants as sureties on said bond. That on October 26, 1903, M. T. Campbell filed in the Probate Court of Shawnee County an inventory and appraisement of the property of Ferdinand Fensky, deceased, to be administered by him; that in said inventory the defendant, M. T. Campbell, listed and caused to be appraised twenty-three promissory notes, some of which were secured by mortgage appraised at a valuation of \$16,630.50, and also listed as property of Ferdinand Fensky, deceased, cash in hands of said M. T. Campbell in the sum of \$4,297.14; that on April 26, 1905, M. T. Campbell filed in the Probate Court of Shawnee County a final account of his administration of said estate; that on the 6th day of June, 1905, an order was entered by said Probate Court finally closing and settling the estate of said Ferdinand Fensky, deceased, and discharging M. T. Campbell, as administrator.

### SECOND COUNT.

These answering defendants for second and further defense to plaintiffs' petition say that in the administration of said estate, M. T. Campbell acted in good faith in the handling of said estate; that M. T. Campbell at that time was a practicing lawyer in the City

of Topeka and had been so practicing for more than thirty years; that there came into the hands of M. T. Campbell, as administrator, of said estate, certain real estate contracts in which Ferdinand Fensky had agreed to sell to certain persons named therein certain lands and lots at an agreed price; the purchaser paying a small amount down and to make monthly payments upon said contracts until fully paid out, at which time Ferdinand Fensky was to execute a warranty deed to the lots. That there was a forfeiture clause in said contract by the terms of which if the purchaser failed to make any of the several payments when the same became due that Ferdinand Fensky had the right to declare a forfeiture under said contract and take back the land; that certain of these contracts came into the possession of M. T. Campbell after the death of Ferdinand Fensky and that M. T. Campbell believed that said contracts, together with the land covered by them, constituted real estate and was not subject to be administered upon by him. That M. T. Campbell not only believee this to be the law but that other reputable attorneys agreed with him that none of such contracts were the personal property to be administered on as a part of the assets of the estate of Ferdinand Fensky, deceased. That so believing M. T. Campbell did not inventory nor appraise said contracts, but in lieu of them he returned in his inventory Fensky's Addition to the City of Topeka and also certain land owned by Fensky at the time of his death. That if these contracts were personal property and should have been inventoried and appraised by said administrator, then



it was simply a mistake on behalf of said M. T. Campbell and not a wilful or intentional wrong for the purpose of beating plaintiffs out of any interest they might have in the estate of Ferdinand Fensky, deceased, on account of being his sisters; that there was no intentional wrong on behalf of said administrator, if any wrong was committed, and, therefore, plaintiffs are not entitled to recover.

### THIRD COUNT.

These defendants for third and further defense to plaintiffs' petition says that the pretended cause of action stated in plaintiffs' petition accrued more than two years prior to the bringing of this suit and, therefore, is barred by the statute of limitations and no recover can be had thereon.

### FOURTH COUNT.

These defendants for fourth and further defense to the cause of action stated in plaintiffs' petition say that the pretended cause of action stated therein accrued more than five years before the commencement of this suit and, therefore, is barred by the five years statute of limitations.

WHEREFORE, defendants pray that they may go hence without day and recover their costs herein laid out and expended.

J. B. Larimer  
Hazen and Gaw

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Attorneys for Defendants, Thomas Page and  
E. C. Arnold.

Leave given this 21st day of September, 1916, to file the within Answer.

George H. Whitcomb

Dist. Judge.

Filed September 22, 1916,

C. W. Bower,

Clerk District Court.

IN THE DISTRICT COURT OF SHAWNEE  
COUNTY, KANSAS.

LOUISA PICKENS AND	)	
	)	
JOHANNA SCHUTT,	)	
PLAINTIFFS,	)	
VS.	)	NO. 28,758.
	)	
DONALD A CAMPBELL, AS	)	
	)	
ADMINISTRATOR ET AL.,	)	
DEFENDANTS.	)	

PLAINTIFFS' REPLY TO THE ANSWER OF  
DONALD A. CAMPBELL AS ADMINISTRATOR  
WITH THE WILL ANNEXED OF THE ESTATE  
OF M. T. CAMPBELL, DECEASED.

Comes now the plaintiffs and for their reply to the second count in the answer of said Donald A. Campbell, administrator, deny that said M. T. Campbell acted in good faith in the handling and settling of said estate.

Plaintiffs further deny that the question ever arose as to whether M. T. Campbell should list said contracts as personal property of the estate of Ferdinand Fensky, deceased, or should treat the contracts and lots and land covered by the contracts as real estate.

Plaintiffs further deny that after a full and careful investigation said M. T. Campbell arrived at the conclusion that said contracts together with the lots and land they covered were a part of the real estate of Ferdinand Fensky at his death and should be treated in the administration of said estate, and that by reason of there being real estate they passed under the laws of Kansas to Jeanette Fensky, widow of Ferdinand Fensky, deceased.

Plaintiffs further deny that said M. T. Campbell did not believe that said real estate contracts should be administered by him as a part of the personal property of the estate of Ferdinand Fensky.

Plaintiffs further deny all that part of said second count which relates to advice with attorney John V. Goodrich of California or as to opinion given by said Goodrich.

Plaintiffs further deny that said M. T. Campbell was mistaken in his conclusion as to whether these contracts should be administered by him as though personal property and deny that such personal property was omitted from the inventory and administration of said estate by reason of the brief of said M. T. Campbell that said contracts and other property were real estate.

### SECOND.

The plaintiffs herein for reply to the third and fourth counts in the answer of Donald A. Campbell, as administrator, deny each and every allegation and averment in each of said counts.

Wherefore, plaintiffs pray judgment as prayed for in their petition herein.

H. W. Page and W. R. Hazen

Filed October 12, 1917,                      Attorneys for Plaintiffs.  
Mary E. Chapin,  
Clerk District Court.

IN THE DISTRICT COURT OF SHAWNEE  
COUNTY, KANSAS.

LOUISA PICKENS AND	)	
	)	
JOHANNA SCHUTT,	)	
PLAINTIFFS,	)	
VS.	)	NO. 28,758.
	)	
DONALD A. CAMPBELL, AS	)	
	)	
ADMINISTRATOR, ET AL.,	)	
DEFENDANTS.	)	

PLAINTIFFS' REPLY TO THE SEPARATE  
ANSWERS OF THE DEFENDANTS, THOMAS  
PAGE AND E. C. ARNOLD.

— — — — —  
Come now the plaintiffs and for their reply to the second count in the answer of said defendants, Thomas Page and E. C. Arnold, deny that said M. T. Campbell acted in good faith in the handling and settling of said estate.

Plaintiffs further deny that the question ever arose as to whether M. T. Campbell should list said contracts as personal property of the estate of Ferdinand Fensky, deceased, or should treat the contracts and lots and land covered by the contracts as real estate.

Plaintiffs further deny that after a full and careful investigation said M. T. Campbell arrived at the con-



clusion that said contracts together with the lots and land they covered were a part of the real estate of Ferdinand Fensky at his death and should be treated in the administration of said estate, and that by reason of there being real estate they passed under the laws of Kansas to Jeanette Fensky, widow of Ferdinand Fensky, deceased.

Plaintiffs further deny that said M. T. Campbell did not believe that said real estate contracts should be administered by him as a part of the personal property of the estate of Ferdinand Fensky.

Plaintiffs further deny that M. T. Campbell not only believed said real estate contracts constituted real estate but that reputable attorneys agreed with him that none such contracts were the personal property to be administered on as a part of the assets of the estate of Ferdinand Fensky, deceased, and that so believing M. T. Campbell did not inventory or appraise said contracts.

Plaintiffs further deny that said M. T. Campbell was mistaken in his conclusion as to whether these contracts should be administered by him as though personal property and deny that such personal property was omitted from the inventory and administration of said estate by reason of the brief of said M. T. Campbell that said contracts and other property were real estate.

## SECOND.

The plaintiffs herein for reply to the third and fourth counts in the separate answers of the defend-

ants, Thomas Page and E. C. Arnold, deny each and every allegation and averment in each of said counts.

WHEREFORE, plaintiffs pray judgment as prayed for in their petition herein.

H. W. PAGE AND W. R. HAZEN

Attorneys for Plaintiffs.

Filed October 12, 1917,

Mary E. Chapin, Clerk District Court.

BE IT REMEMBERED, That on the 16th day of March, A.D., 1918, in the Shawnee County District Court, Third Judicial District, State of Kansas, before the Honorable George H. Whitcomb, presiding Judge of the Second Division, it being at the April Term of said court, the following proceedings among others were had, to wit:

Louisa Pickens and Johanna  
Schutt, Plaintiffs,

vs.

No. 28,758.  
Second Division.

Donald A. Campbell, as Administrator  
with the will annexed of the Estate  
of M. T. Campbell, deceased; Thomas  
Page and E. C. Arnold, Defendants.

### JOURNAL ENTRY.

NOW, on this 16th day of March, 1918, the above entitled cause having heretofore been tried and taken under advisement, came regularly on for the decision and judgment of the court, and the court being fully advised in the premises, finds in favor of the defend-

ants and against the plaintiffs, that plaintiffs are not entitled to any recovery in this action, and enters Memorandum of Opinion in words and figures as follows:

### MEMORANDUM OF DECISION.

The first question to be determined in this case, is whether there is sufficient ground to set aside the order of final settlement made by the Probate Court of Shawnee County June 6, 1905, in the estate of Ferdinand Fensky, deceased, on account of the fraud of the administrator, M. T. Campbell. This suit was filed May 15, 1914, nearly nine years after the final discharge of the administrator. However, the evidence shows that the action was brought within two years after the discovery of the alleged fraud so that there seems to be no controversy regarding the statute of limitations.

Ferdinand Fensky died in California August 7, 1903, intestate, while a resident of that state. He left no children but his widow, Jeanette Fensky, survived him and seven brothers and sisters and the son of a deceased brother. At the time of his death he owned both real estate and personal property in California and in Kansas. His widow was appointed administratrix in California and on September 9, 1903, M. T. Campbell was appointed administrator of his estate in Kansas by the Probate Court of Shawnee County. Campbell filed an inventory October 26, 1903, and his final account April 26, 1905. It is conceded that the personal property in both states descended under the

laws of California one-half to the widow and the other half to the other heirs above referred to and that real estate in Kansas descended to the widow. During the administration of the estate the widow bought and received assignments of the interests of all the other heirs, paying \$1,000 for each of the eight shares with the exception that \$100 extra was paid to a brother, Fred Fensky, of Leavenworth. At the time of his death Fensky held the title of record to considerable real estate in Shawnee County, mostly in Fensky's Addition, which had been sold on contract, the purchase money for the several pieces of real estate being partly paid at the time of his death. It is claimed by the plaintiffs that Campbell was guilty of fraud in concealing assets and in securing the assignments from the heirs. During the administration, Campbell, also acted as agent of Mrs. Fensky, the widow, and it is also claimed that he acted in her interest in matters pertaining to the property and not for the heirs generally.

John V. B. Goodrich was the attorney for Mrs. Fensky in California and he and Campbell had considerable correspondence early in the administration as to how the property of Fensky should be distributed under the circumstances and they agreed that the personal property wherever situated should be divided equally between Mrs. Fensky and the other heirs and after some consideration of the matter they both came to the conclusion that the interest of Fensky in the real estate in Kansas which he had sold under contract was real property and descended under the laws



of Kansas to Mrs. Fensky. The principal contention of plaintiffs regarding the alleged fraud is that the interest of Fensky in this real estate was personal property and descended one-half to the brothers and sisters, and that Campbell fraudulently concealed the facts about this property. This case has been in the Supreme Court, (98 Kansas, 518). It is incorrectly assumed in the opinion (Page 522) that Fensky had received notes for the sale of the real estate and it is stated that "ordinarily the right to the purchase price of land contracted to be sold but not conveyed at the time of the vendor's death passes to his personal representative and not to his heirs", and it is further said, "The petition contains nothing to suggest a different rule here but if the evidence should show that the administrator believed that the notes therein referred to followed the rule of real estate and became the property of the widow, no statements made by him in good faith by reason of that belief, however incorrect from a legal point of view, would warrant a re-opening of the administration." This view of the matter as to intentional fraud on the part of the administrator is binding on this court and was doubtless intended for its guidance on final hearing of the case. Two questions may be considered under this claim of fraud: First, was the interest of Ferdinand Fensky in these lands real property, and, second, whether it was or not did Campbell, the administrator, either rightly or mistakenly, believe the same to be real estate.

All of the Fensky contracts were written on the same form, headed "Agreement-For Warranty Deed."

By the terms of each Fensky "Covenants and agrees to sell and convey" the real estate, and it is provided "that if default be made in fulfilling this agreement or any part thereof by or on behalf of said party of the second part (the purchaser) this agreement shall, at the option of said party of the first part, be forfeited and determined and said party of the second part shall forfeit all payments made by him on the same and such payments shall be retained by the party of the first part (Fensky) in full satisfaction and in liquidation of all damages by him sustained." Under these provisions was the interest of Fensky in the real estate which he agreed to sell real or personal property? Various forms of real estate contracts have been before our Supreme Court which should be considered in answering this question. It will be noted that the forms in most of the cases differ from that in question here.

In the case of Douglas County against Union Pacific Railway Company, 5 Kansas, 615, a contract for the sale of Government land did not expressly make time of the essence of the contract. The court recognized the equitable doctrine that when land is sold on credit and a deed is to be made when the purchase money is paid the land at the time sale is made becomes the vendee's and the purchase money the vendor's. But it is said in the opinion, "This maxim never applies where time is of the essence of the contract and where the land is subject to absolute forfeiture on failure of some conditions of the sale being performed. ----- In such a case no title, legal or equitable,

passes until every condition of the sale is performed." This language is quoted, at least without disapproval, in *Williams vs Osage County*, 84 Kansas, 508, 516.

The contract and facts in *Courtney* against *Woodworth*, 9 Kansas, 443, differ from those in question here in that notes were given for the balance of the purchase money and time was not made of the essence of the contract and there was no forfeiture clause.

In the case of *Brown* against *Thomas*, 37 Kansas, 282, the contract provided that the interest of the vendee should be forfeitable at the option of the seller, time was made of the essence of the contract, there were no notes for the purchase money and the agreement was "to sell" and not a contract of sale. The form of the contract was practically the same as the *Fensky* form except that time was expressly made of the essence of the contract.

In *Burke* against *Johnson*, 37 Kansas 337, the contract contained no forfeiture clause, time was not of the essence and a purchase money note was given to the vendor.

Under the contract in *Jones* against *Hollister*, 51 Kansas, 310, notes were given for the purchase money, there was no forfeiture clause and time was not of the essence of the contract. And in *Usher* against *Hollister*, 58 Kansas, 431, the situation was the same.

In the case of *Gilmore* against *Gilmore*, 60 Kansas, 606, which is particularly relied upon by the plaintiffs, notes were given for the balance of the purchase money, time was not made of the essence of the contract and there was no forfeiture clause.

In *Roberts against Yaw*, 62 Kansas, 43, it was held that time might be made the essence of a contract for the sale of real estate by performance or tender of performance by one party and demand on the other.

In *Peterson against Davis*, 63 Kansas, 672, it is noted that when time of payment is made of the essence of a contract it is to be enforced like any other provision.

*Reed against Mix*, 63 Kansas, 745, another case relied upon by plaintiffs, was a suit for specific performance of a real estate contract which had no forfeiture provision and which did not make time of the essence of the contract. The defendant sought to rescind the same. The court held that rescission could not be had, time not being of the essence of the contract.

In the case of *Campbell against Kansas Town Company*, 69 Kansas, 314, it was held that ejectment could not be maintained for non-payment of purchase money under a real estate contract, time not being of the essence and the contract containing no forfeiture clause.

In *Williams against Osage County*, 84 Kansas, 508 the question of the right of taxation of the interest of a vendor of real estate sold on contract was again before the court and it was held under the contract as personal property there involved such interest was taxable. The court, however, distinguishes between the situation there existing and that arising under the contract in *Brown against Thomas*, 37 Kansas, 282. The portion of the opinion in *Douglas County against*



Union Pacific Railway Company, 5 Kansas, 615, already noted, is quoted by the court followed by the remark that "The distinction here made illustrates the difference between this case and *Grown against Thomas*, 37 Kansas, 282. In the latter case time was made of the essence of the contract and all rights of the purchaser were immediately forfeited upon the failure to pay at the exact time." It may be observed in regard to this case that the able judge of the District Court deciding the case below held that the contracts were not taxable, relying doubtless on the case of *Brown against Thomas*.

It was held in *Drollinger against Carson*, 97 Kansas, 502, that time might be made of the essence of a contract by tender of performance and demand, following *Roberts against Yaw*, *Supra*. It is also noted in that case that forfeiture clauses of contracts are sometimes said to make time of the essence of a real estate contract.

It is asserted by counsel for the plaintiffs in this case that at the time Campbell had under consideration the question of whether or not Fensky's interest in the real estate sold on contract was real or personal property the law was settled in this state that his interest was personalty and Campbell should have known it and that he was guilty of fraud in deciding and advising to the contrary. I am not able to concur in this view. The Supreme Court of this state has never held to that effect where a contract was involved such as is under consideration in this case. The case of *Brown against Thomas*, 37 Kansas, 282, upon which

Campbell doubtless relied, has never been overruled or even modified.

It must be said even at the present time and with the decisions made since 1903 in view, either that Campbell and Goodrich were right in their view of the law or that the question is a doubtful one. Shortly prior to 1911 Judge Heizer, of the Osage District Court, held in the case of Williams against Osage County, already referred to, that the interest of a vendor under a real estate contract containing no forfeiture clause was not personal property. He was mistaken but his opinion, of course, was entertained in good faith. In either case it is certain that Campbell could not be charged with fraud if he believed the Fensky interest was real estate. A careful examination of the correspondence carried on by him at the time leads to the conclusion that he was honestly of the opinion that this interest was real estate and that it descended to Mrs. Fensky, and that the other heirs had nothing to do with it. It is true that in his correspondence with Mrs. Fensky at the time of the negotiations for the purchase of the interests of the other heirs he shows a disposition to keep the matter of the contracts in the back-ground, but from his point of view this was not an improper concealment of the facts. He believed that the heirs had no interest in that property and his purpose, as shown by his letters, was to prevent unnecessary and expensive litigation. The matter of the character of Fensky's interest in these properties in Shawnee County was open for the investigation of any of the heirs. It was in fact in-

vestigated by Fred Fensky of Leavenworth and by his attorney and after such investigation the attorney evidently came to the same conclusion Campbell did. There was also an attorney employed in connection with the interest of the sister in Germany although it does not appear what investigation was made by him.

Would a court be warranted in holding that Campbell was guilty of fraud under such circumstances? Unfortunately before the trial of this case he died. He is not here to tell his side of the story. It appears that he was a lawyer in good standing at this bar for many years. Aside from any facts shown in evidence as to his uprightness this court must presume under the well known rules of law applying to fraud that he was honest and that his dealings were in good faith. It would be an unjust thing to blacken his character by a finding of fraud on his part because he believed that under the law this property belonged to Mrs. Fensky and acted upon that belief. This court will not give support to so unjust a contention.

Some claim is made that Campbell was guilty of fraud in not reporting certain money in the bank belonging to Fensky at the time of his death. All of this money except a small amount was remitted to Mrs. Fensky in California. A portion appears to have been retained by Campbell as administrator. He doubtless had sufficient reason for making this division of the money and forwarding the most of it to California. It is a question whether this is not exactly what he should have done, that being the place of primary ad-

ministration, (Denny against Faulkner, 22 Kan. 89). There are also two or three notes which it is claimed should have been included in the property here and which or their proceeds were turned over to Mrs. Fensky and claimed by her as her individual property. The evidence is not sufficient to warrant the court in finding fraud on Campbell' part in connection with these transactions. If Mrs. Fensky obtained property which was not hers, claim should be made against her estate in California or in connection with the administration of her husband's estate there. It appears from the correspondence between Goodrich and Campbell that they had no disposition to deprive the brothers and sisters of their share in the estate so far as the legal questions were concerned. They frankly conceded their rights both in the personal property in Kansas and in that in California. It made no difference where the administration was had as to the division of that property. My conclusion is that the evidence offered in this case is entirely inadequate to convict M. T. Campbell of fraud or of any bad faith in connection with the administration of the Fensky estate or otherwise, and that this action is without merit.

George H. Whitcomb

Dated March 16, 1918.

Judge.

IT IS, THEREFORE, ORDERED AND ADJUDGED, That the defendants go hence without day and recover of and from the plaintiffs herein their costs laid out and expended taxed at \$——, and hereof let execution issue.



To which judgment and decision of the court, the plaintiffs each duly excepted at the time and still except.

O. K. Z. T. HAZEN, W. B. SUTTON

IN THE DISTRICT COURT OF SHAWNEE  
COUNTY, KANSAS. SECOND DIVISION.

LOUISA PICKENS AND	)	
JOHANNA SCHUTT,	)	
PLAINTIFFS,	)	
	)	
VS.	)	CIVIL ACTION.
	)	
DONALD A. CAMPBELL, AS	)	NO. 28,758.
ADMINISTRATOR, ET AL.,	)	
DEFENDANTS.	)	

# MOTION FOR NEW TRIAL.

And now come said Louisa Pickens and Johanna Schutt, plaintiffs, and move the Court to vacate the decision and judgment rendered by the Court in this action on the 16th day of March, A. D. 1918, and to grant said plaintiffs a new trial of this action, for the following causes which affect materially their substantial rights, to wit:

First. Abuse of discretion by the Court.

Second. Misconduct of the jury.

Third.

Fourth. Accident and surprise which ordinary prudence could not have guarded against.

Fifth. The ..... was not afforded a reasonable opportunity to present his evidence and be heard on the merits of the case.

- Sixth. Erroneous rulings of the Court.  
Seventh. Erroneous instructions given by the Court and proper instructions refused by the Court.  
Eighth. The.....was given under the influence of passion and prejudice.  
Ninth. The decision and judgment is in whole or in part contrary to the evidence.  
Tenth. Newly discovered evidence, material for said plaintiffs, and which they could not, with reasonable diligence, have discovered and produced at the trial.  
Eleventh.

Wm. B. Sutton

Attorney for Plaintiffs.

Kansas City, Kansas.

Filed March 16, 1918.

Mary E. Chapin, Clerk District Court.

BE IT REMEMBERED, That on the 25th day of May, 1918, the Shawnee County District Court met, pursuant to adjournment, Hon. Robert D. Garver, Presiding Judge of the First Division, and Hon. George H. Whitcomb, Presiding Judge of the Second Division, at which the following proceedings were had, to wit:

Louisa Pickens, et al.,	Plaintiffs.
vs.	No. 28,758.
Donald A. Campbell, as Administrator with the Will annexed of the Estate Of M. T. Campbell, deceased, et al.,	Defendants.

JOURNAL ENTRY.

NOW, on this 25th day of May, 1918, plaintiffs' motion for new trial, heretofore heard and taken

under advisement, comes on for decision by the court, and the court being fully advised in the premises, on due consideration thereof, finds that said motion should be, and the same is hereby overruled.

STATE OF KANSAS, SHAWNEE COUNTY, ss.

I, Mary E. Chapin, Clerk of the District Court in and for the County and State aforesaid, do certify that I have compared the annexed and foregoing instruments of writing with the originals now on file or of record in my office, and in my custody as Clerk, in a certain cause in said court wherein Louisa Pickens and Johanna Schutt were plaintiffs, and Donald A. Campbell, as Administrator with the will annexed of the Estate of M. T. Campbell, et al, were defendants, and the same are true and correct copies of said originals  
is a copy  
and the whole thereof

IN WITNESS WHEREOF, I have hereunto set my name and affixed the seal of said court at Topeka, in said County and State, this 4th day of September, 1918.

Mary E. Chapin

(SEAL)

Clerk District Court.

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STATE OF KANSAS, SHAWNEE COUNTY, ss.

I, George H. Whitcomb, Judge of the District Court in and for the County and State aforesaid, and of the Third Judicial District, do hereby certify that Mary E. Chapin, whose name is subscribed to the foregoing certificate of attestation, now is, and was at the time of sealing the same, the Clerk of said Court whereof I am the Judge, and the keeper of the records and seal

thereof, duly elected, commissioned and qualified as such Clerk. The signature to the above certificate is in his handwriting, and said attestation is in due form of law and made by the proper officers.

IN WITNESS WHEREOF, I have hereunto set my hand, at Topeka, in said State and County, this 4th day of September, 1918.

George H. Whitcomb

Judge of the District Court.

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STATE OF KANSAS, SHAWNEE COUNTY, ss.

I, Mary E. Chapin, Clerk of the District Court of the Third Judicial District, in and for said County and State, do hereby certify that Hon. George H. Whitcomb, who signed the foregoing certificate, is the duly commissioned, acting and qualified Judge of said District Court of the Third Judicial District, whereof I am the Clerk, and that the signature to the foregoing certificate is in his handwriting.

IN WITNESS WHEREOF, I have hereunto affixed the seal of said court, and set my hand at Topeka, Kansas, this 4th day of September, 1918.

Mary E. Chapin,

(SEAL)

Clerk District Court.

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Copies of the papers and records set forth in the said Exhibit E-1 are annexed to the supplemental answer of the defendant, J. H. Merriam, on file in this action and are also annexed to the supplemental answer of the defendants, Eugene Wellke, Alma J. Schmidt and Minnie S. Farnsworth on file in this action.



It was stipulated as a fact that no further proceedings were taken in the said action in the nisi prius court, but the plaintiffs objected to the introduction or consideration of the said fact in evidence upon the ground that the same was incompetent, irrelevant and immaterial and not binding upon any of the parties to this action and outside the issues of this case. Objection overruled and exception noted.

It was stipulated that the decision appearing in Volume 179 of the Pacific Reporter, page 343 and succeeding pages, is a true copy of the decision as rendered by the Supreme Court of Kansas in the same proceeding. The defendants offered in evidence the said decision of the Supreme Court of Kansas.

The plaintiffs objected to the introduction of the said decision upon the same grounds last stated. Objection overruled and exception noted.

The court: It will be admitted with the same limitations.

The said decision was received in evidence and marked Defendants' Exhibit F-1. The same is as follows:

PICKENS et al. v. CAMPBELL et al.

(No. 21994.)

(Supreme Court of Kansas. March 8, 1919.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER - 78 - CONTRACTS - TIME OF PERFORMANCE.

It is not necessary that any particular form of expression be used to make time of performance by the

vendee as essential element of a contract relating to the sale of real estate; and such is the effect of a contract of sale which conditions conveyance on performance at the time specified, and reserves to the vendor the right of forfeiture and the right of possession in case of default by the vendee.

## 2. EXECUTORS AND ADMINISTRATORS - 43 INVENTORY - PERSONAL PROPERTY.

The equitable doctrine that, when land is sold on deferred payments and the deed is to be delivered when the payments have been made, the vendor becomes a trustee of the title for the benefit of the vendee, does not apply to such a contract. The entire title remains in the vendor until the vendee has performed, and, should the vendor die, the contract is not personal property, to be inventoried and administered as such by his personal representative.

Appeal from District Court, Shawnee County.

Action by Louisa Pickens and another against Donald A. Campbell, as administrator, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Monroe, McClure & Monroe, of Topeka, for appellants.

Z. T. Hazen and J. B. Larimer, both of Topeka, for appellees.

Burch, J. This is a second appeal. The general nature of the controversy is indicated in the former opinion. *Pickens v. Campbell*, 98 Kan. 518, 159 Pac. 21. On return of the cause to the district court a trial occurred which resulted in judgment for the defendants. The plaintiffs appeal.

The chief subject of dispute was the nature of the uninventoried real estate contracts, the real estate itself having been scheduled as such. In the former opinion it was said:

“Ordinarily the right to the purchase price of land, contracted to be sold but not conveyed at the time of the vendor’s death, passes to his personal representative and not to his heirs. *Gilmore v. Gilmore*, 60 Kan. 606, 57 Pac. 505; 18 Cyc. 187; 11 R. C. L. 124; Note, 57 L. R. A. 646. The petition contains nothing to suggest a different rule here, but, if the evidence should show that the administrator believed that the notes therein referred to followed the rule of real estate and became the property of the widow, no statements made by him in good faith by reason of that belief, however incorrect from a legal point of view, would warrant a reopening of the administration”. 98 Kan. 522, 159 Pac. 23.

As the quotation indicates, the precise nature of the contracts was not disclosed by the petition, and from certain ambiguous statements it was inferred that notes were given for the purchase price. It appeared at the trial that such was not the case, and that in each instance the only writing consisted of a contract in the following form:

“Witnesseth, that said party of the first part (F. Fensky), for the consideration hereinafter mentioned, covenants and agrees to sell and convey unto said party of the second part (the purchaser), his heirs and assigns, all the following described real estate situated

in the county of Shawnee and state of Kansas, to wit:  
(Description of property.)

"In consideration of which, said party of the second part covenants and agrees to pay unto the said party of the first part, for the same, the sum of (amount), as follows: (Terms of payment.) And said party of the first part, on receiving said sum and sums of money, at the time and in the manner aforementioned, shall at his own expense execute and deliver to said party of the second part a good and sufficient warranty deed.

"It is further agreed between the parties to these presents that said party of the second part shall pay all taxes or assessments becoming chargeable to or upon said premises after this date; and if default be made in fulfilling this agreement, or any part thereof, by or on behalf of said party of the second part, this agreement shall, at the option of said party of the first part, be forfeited and determined, and said party of the second part shall forfeit all payments made by him on the same, and such payments shall be retained by said party of the first part in full satisfaction, and in liquidation of all damages by him sustained, and he shall have the right to re-enter and take possession of said premises."

(1, 2) If the real estate contracts were not personal property, they had no place in the personal property inventory the administrator's motive in omitting them from the inventory was not material, the plaintiffs had no interest in them, and the main foundation of the suit fails.



It will be observed that the form of contract used was not one of present sale; it was one to sell. No obligation on the part of the vendor to convey arose except on receiving the stipulated sums of money, at the time and in the manner specified. In case of default, the right to forfeit and to re-enter was expressly reserved. The forfeiture clause is identical with that appearing in the contract considered in the case of *Drollinger v. Carson*, 97 Kan. 502, 505, 155 Pac. 923. It was there said that such provisions are sometimes held to make time of the essence of the contract, citing 39 Cyc. 1369, 1370. It was not necessary to declare that such was the effect in that case, because, after default of the vendee, the vendor made time essential by demanding payment within a stated period, under penalty of forfeiture. That is just what the contract under consideration did at the beginning of the relations between the vendor and the vendee. Title was withheld; performance by the vendee at the time stipulated was a condition precedent to the acquisition of title; default entailed forfeiture of payments already made, and right of possession; the vendor was then at liberty to re-enter or to invoke the remedy of ejectment; and insertion of the formula, "Time is of the essence of this contract," would have been superfluous.

In the case of *Douglas Co. v. U. P. Ry. Co.*, 5 Kan. 615, 621, the contract did not contain a statement that time of performance by the vendee was an essential element, but the court said:

"It is true that the company had made a conditional purchase of this land, but they were not to receive the

patent therefor until all the conditions of the purchase were fulfilled; and, if any one of the conditions were violated, \*\*\* they were to forfeit all their right, title and interest in and to said land, and it was then to be sold to other parties. It will be perceived from the very nature of this contract, and from the character of the parties to the same, that time was an essential ingredient of the contract. The contract was purely executory, and it was not intended that the government should be bound to execute its part of the contract, by parting with any portion of its land, unless the railroad company should fulfill every portion of its part of the contract first – and strictly within the time stipulated. It was not intended to have any lawsuits over the matter.”

In this case most of the lots were sold for small payments to be made during considerable periods of time, and it is quite clear that Ferdinand Fensky intended to forestall lawsuits by requiring purchasers to accept contracts which provided for strict performance, under penalty of forfeiture. The result is, the contract is identical in all its legal aspects with the contract considered in *Brown v. Thomas, Sheriff*, 37 Kan. 282, 15 Pac. 211, and the vendor continued to be the owner of the land. In the opinion in the case just cited it was said:

“The maxim that equity considers, when land is sold on credit, and the deed is to be made when the purchase money is paid, that the land at the time of the purchase becomes the vendee’s, and the purchase money the vendor’s, and that the vendor becomes the trustee

of the vendee with respect to the land, and the vendee the trustee of the vendor with respect to the purchase money, is not applicable here. \*\*\* The legal title has not passed to him (the vendee), because no deed or other conveyance has yet been made; and the equitable title has not passed, because the land has not been paid for, and because—on account of the provisions for forfeiture—it is clearly the intention of the parties as indicated in the contract, that such title shall not pass until the land is paid for.” 37 Kan. 286, 15 Pac. 213.

The plaintiffs rely on the case of *Gilmore v. Gilmore*, 60 Kan. 606, 57 Pac. 505, which was cited in the former opinion under the circumstances which have been stated. In the *Gilmore Case* notes were given for the purchase price, time of performance was not an essential element of the contract, and no provision was made for forfeiture in case of default.

The plaintiffs cite the case of *Williams v. Osage County*, 84 Kan. 508, 114 Pac. 858, 34 L. R. A. (N. S.) 1221. In that case the court expressly stated that the contracts involved differ materially from the contract considered in the *Brown Case*, and quoted from the *Douglas County Case* to illustrate the differences. The first contract in the *Osage County Case* provided for a cash payment of \$500, a payment of \$2,000 on March 1, 1907, and a payment of \$2,000 on March 1st annually thereafter until the full price of \$12,000 was paid. Time was made of the essence of the contract, and right of forfeiture was reserved, with respect to the payment due March 1st, 1907, only. The litigation

concerned the status of the contract in 1908, the vendor making no claim of default or ground for forfeiture occurring in March, 1907. The second contract involved in the Osage County Case not only did not provide for forfeiture, but it expressly provided that in case of default the vendor might take such steps to enforce it as he saw fit.

The plaintiffs say the Brown Case should be overruled. The court is entirely satisfied with the decision in the Brown Case; but, if it were not, it would hesitate to overturn a rule of property first announced in the Douglas County Case in 1870, and recognized as late as 1911 in the Osage County Case.

The record in the case vindicates not only Mr. Campbell's ability as a lawyer, but the good faith of his conduct and his sagacity as a business man. On September 4, 1903, John V. B. Goodrich, an attorney of San Pedro, Cal., wrote Mr. Campbell a letter advising him of Mr. Fensky's death and intestacy while resident in California, stating that Mr. Goodrich had been employed by Mrs. Fensky to settle the estate, and on behalf of Mrs. Fensky requesting Mr. Campbell to act as administrator of the portion of the estate situated in Kansas. On September 8th, Mr. Campbell replied, consenting to act as administrator. He was already familiar with the Fensky interests here and at the threshold of the contemplated administration was the question of what was real estate, descending to the widow according to the law of Kansas, free from interference by the administrator, unless needed for payment of debts, and what was personal property, to be inven-



toried and administered, but finally to be distributed according to the law of California. So far as known, Mr. Campbell had never even heard of Mr. Goodrich before, and, writing as one lawyer to another, he said:

"Of course, all his real estate here will go to her under our statute, but I suppose all his personal property, which will include all notes and mortgages, will descend under the law of California. Is not that your understanding?

"An administrator here is quite necessary in view of the many mortgages and land contracts he left, \*\*\* and, if the administrator can act in the capacity of agent generally for her, it would simplify matters and perhaps be less expensive. \*\*\*

"Give me your views of Mrs. Fensky's relation to the land and lot contracts for deed; if she is now the sole owner of the lands, and I think (without investigating the question) that she is, ought she not either to make new contracts in her own name, or give deed and take back mortgages for balances of purchase money?\*\*\*

"Is it at all probable that the brothers and sisters will make any claim to the contracts for deeds for property here? As soon as I am appointed administrator I will be besieged, and I want to know your view on some of these important questions before expressing my opinion."

On September 14th, Mr. Goodrich replied, and among other things said:

"You ask me to give my views of Mrs. Fensky's relation to the land and lot contracts for deeds. My

opinion is that Mrs. F., under your laws, is now the sole owner of said lands. \*\*\*

"In relation to the brothers and sisters making any claim to the contracts for deeds, Mrs. F. says that she cannot tell what they will do; but so far as the personal property is concerned, and also the land here, I have advised her to compromise with and get their receipts in full for what interest they may have in the estate. If you have any suggestions to make along the line of such a compromise, please do so, and assist us in bringing the same about."

On September 18th, Mr. Campbell wrote Mr. Goodrich as follows:

"I agree with you that the land contracts for deed are not personal property, but that Mrs. Fensky is the sole heir at law and now the sole owner in fee of all the Kansas real estate, including that contracted to be sold, but subject, of course, to debts, if any, of deceased, and the rights of contracting purchasers, and thus we will treat the matter. \*\*\*

"So far as the real estate here is concerned, she became absolute owner of it in fee upon her husband's death; and without reference to any probate proceedings, whether an administrator was appointed or not, she can do as she pleases with it, subject all the time and only to the claims of creditors, and we all know there are no creditors." \*\*\*

"I think your idea of having Mrs. Fensky buy out the other heirs is a good one. It will simplify matters and shorten up the proceeding."

It thus appears that both lawyers, each acting independently of the other and on his own judgment, arrived at the same conclusion respecting the status of the real estate contracts. There is not the slightest doubt that each one expressed his honest opinion. Both men were right, and, in settling with the heirs, representations as to the nature and value of the distributable estate were neither false nor fraudulent because the real estate contracts were not recognized as part of the personalty.

Having determined that the contracts were not personal property and that the land affected belonged to the widow, Mr. Campbell exercised great prudence in preventing information respecting them from being noised about. To be blunt about it, he sedulously concealed their existence, as far as he could, and for the soundest business reasons. The circumstances were such that it would have been financially disastrous to involve the contracts in litigation. Covetous relatives of the deceased with everything to gain and nothing to lose, and possibly having exaggerated notions of Mr. Fensky's wealth, would be likely to find lawyers who would institute speculative suits for them, just as occurred ten years later. As administrator, Mr. Campbell occupied no relation of trust or confidence toward distributees of personalty, with respect to real estate owned by the widow. He rested under no duty to such distributees to produce the contracts or to give information or advice concerning them; and the remarks of the learned trial judge, in a written opinion filed in

connection with the decision of the case in the district court, are pertinent here:

"The matter of the character of Fensky's interest in these properties in Shawnee county was open for the investigation of any of the heirs. It was in fact investigated by Fred Fensky of Leavenworth, and by his attorney, and after such investigation the attorney evidently came to the same conclusion Campbell did.\*\*\*

"Would a court be warranted in holding that Campbell was guilty of fraud under such circumstances? Unfortunately, before the trial of this cause he died. He is not here to tell his side of the story. It appears that he was a lawyer in good standing at the bar for many years. Aside from any facts shown in evidence as to his uprightness, this court must presume, under the well-known rules of law applying to fraud, that he was honest and that his dealings were in good faith. It would be an unjust thing to blacken his character by a finding of fraud on his part because he believed that under the law this property belonged to Mrs. Fensky, and acted upon that belief. This court will not give support to so unjust a contention."

The conduct of Mr. Campbell with respect to some other matters was criticized. It is not necessary to discuss the evidence. The court concurs in the conclusion reached by the district court, that the evidence was entirely insufficient to convict Mr. Campbell of fraud or any bad faith in connection with the Fensky estate, or otherwise, and that the action was without merit.

The judgment of the district court is affirmed.

All the Justices concurring.



The defendants offered in evidence the last will and testament of Jeanette Fensky. The same was received in evidence and marked Defendants' Exhibit G-1.

The same is as follows:

#### LAST WILL AND TESTAMENT.

In the name of God, Amen. I, Jeanette Fensky, of Pasadena, County of Los Angeles, State of California, of the age of 61 years, and being of sound and disposing mind and memory, and not acting under duress, menace, fraud, or undue influence of any person whatever, do make, publish and declare this my last WILL AND TESTAMENT in the manner following, that is to say:

First, I give, devise and bequeath to the living nieces and nephews of my deceased husband, Ferdinand Fensky, all my real estate, land contracts, mortgages and mortgage notes on land in Shawnee County, Kansas.

Secondly, (Page 1, of this my Will consisting of two pages)

Jeanette Fensky.

(Page 2, of this my Will, consisting of two pages)

Jeanette Fensky.

Lastly, I hereby nominate and appoint Matt T. Campbell of Topeka, Shawnee County, Kansas, the executor of this my last Will and Testament, and hereby revoke all former Wills by me made.

In Witness Whereof, I have hereunto set my hand and seal this 18th day of September, in the year of our Lord Nineteen Hundred and Seven.

(Testator's Signature) Jeanette Fensky (Seal)

(Testimony of Minnie S. Farnsworth.)

The foregoing instrument, consisting of two pages, besides this, was, at the date hereof, by the said Jeanette Fensky, signed and sealed and published as, and declared to us to be her last Will and Testament, in presence of us, who, at her request and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto.

Don Ferguson, Residing at Pasadena, California.

Lucius A. Parmele, Residing at Pasadena, California.

Endorsed: FILED Aug. 1, 1908. C. G. KEYES, Clerk. By D. S. Burson, Jr. Deputy.

The defendants offered in evidence the certificate of proof of will and the facts found, dated and filed August 14, 1908. whereby the court found that the said will was duly and regularly executed and witnessed.

#### MINNIE S. FARNSWORTH,

one of the defendants, recalled in her own behalf, testified as follows:

#### DIRECT EXAMINATION.

I received one piece of property under the deeds from Mrs. Fensky that were executed September 18, 1907. I wanted to go into possession immediately, but Don Ferguson did not give it to me for two months after Mrs. Fensky's death. The property is improved with a small store building. One portion is used as a plumbing establishment, another portion is a restaurant and a little portion is used by a shoe cobbler. I have never sold it or transferred it to anyone otherwise than the

(Testimony of Minnie S. Farnsworth.)

transfer that I made to Mr. Wellke and by him back to me again.

(It was here stipulated and agreed that all of the testimony of the witness hereinafter appearing was admitted subject to the objection of the plaintiffs that the same was incompetent, irrelevant and immaterial.)

I have made improvements upon the property at my own expense since I have been in possession of it. An alley was opened at the rear for which an assessment was levied. Assessments were paid for opening the alley and for paving it. I do not know whether I paid that amount or whether the receiver paid it out of the income. My individual expenditures have been over \$3000.00 for improvements, interest, taxes and insurance. The income was not sufficient for the expenditures. It cost me three or four thousand dollars more than I got out of it. The property was mortgaged when I took it. I have not paid any portion of the mortgage. The interest has been paid. I paid part of the interest, but I cannot state how much. The principal of the mortgage was \$9000.00 when Mrs. Fensky bought it. I have paid taxes on the property continuously up to the present time except that the last taxes are delinquent. One portion of the building was occupied by the present tenants when Mrs. Fensky bought the property. The other portions of the building have been occupied by various tenants. The receiver who was appointed in the case of Farnsworth vs. Ferguson rented the property.

(Testimony of Minnie S. Farnsworth.)

I am familiar with the property held by my father, Mr. Wellke; it has been in his possession since 1908. There were five pieces of property; one was a vacant business lot; one was a vacant residence lot and the others were cottages. Since 1908 some of the properties have been sold and traded by my father and others taken. The West Colorado Street lot, Lot 21, A. F. Mills' Sub., and the North Fair Oaks Avenue place have been traded; the Magnolia Street lot and the Stevenson Avenue lot have been sold. He has been living on the Winona place. He went to live on the Winona Avenue property immediately after Mrs. Fensky's death and has lived there continuously ever since. I have paid all the taxes assessed against the property for him. There were mortgages on most of the properties that my father got. He paid a mortgage of \$1500.00 on the place where he lives. I do not recall that he paid any other mortgages. He has paid interest on the other mortgages, but I cannot state the amount. On the place where he lives, he paid, in addition to the mortgage, \$235.00. On Lot 21, A. F. Mills Subdivision, on West Colorado Street, my father paid for taxes and interest about \$300.00. For retaining wall, grading and other improvements on Stevenson Avenue he paid \$269.00.

#### CROSS EXAMINATION.

The property that was deeded to me by Mrs. Fensky was valued at \$16000.00 when Mrs. Fensky bought it and at the same value when I got it. In the case of Farnsworth vs. Ferguson a receiver was appointed in



(Testimony of Minnie S. Farnsworth.)

1909 and he is still managing the property. He has received the income and has made the expenditures for repairs and taxes and I have been furnishing money also. The property does not bring sufficient income to pay the expenses of handling it.

Mr. Wellke obtained a vacant business lot on West Colorado Street, being Lot 21 A. F. Mills Subdivision. The vacant residence lot was on Magnolia Avenue. He traded the West Colorado Street lot for a cottage and lot, No. 146 South Pasadena Avenue. He still owns that lot. He sold the Magnolia Avenue lot and received \$815.00 after the expenses were paid. He sold the Stevenson Avenue lot and received \$1700.00 or \$1800.00 for it. He traded the North Fair Oaks Avenue property and got for it No. 726 Manzanita Avenue, a cottage and house and lot.

#### REDIRECT EXAMINATION.

The Vernon Avenue place that was deeded to Mrs. Schmidt was valued at \$3000.00 and mortgaged for \$1500.00. The schmidts paid out this mortgage and placed a \$500.00 mortgage on the property.

As to the property received by my father—the West Colorado Street lot was mortgaged for \$2500.00; the Magnolia Street lot for \$1000.00; the place where he lives for \$1500.00; the North Fair Oaks Avenue place for \$1300.00. The Stevenson Avenue property was clear. These mortgages were all on the property at the time it was deeded to my father.

Q BY THE COURT: Those mortgages were all on that property at the time this property was deeded to you?

(Testimony of Minnie S. Farnsworth.)

A Yes. That made it very hard for father and I to carry ours, because it had been mortgaged.

Q Well, another question: What is the trouble, anyhow?

A Well, the relatives have been keeping it in the courts all these years. I have been trying my best to get it out.

Q How does that tend to keep the receiver in possession?

A Well, we haven't possession of it yet.

\* \* \*

THE COURT: Why was the receiver appointed in the first instance?

MR. POORMAN: I presume to take charge of the rents and income pending determination of the litigation between Mrs. Farnsworth and Mr. Ferguson, Mr. Ferguson claiming the property as his and Mrs. Farnsworth claiming the property as hers.

THE WITNESS: That is it.

THE COURT: This litigation here hasn't anything to do with the receiver?

THE WITNESS: I think that Judge Monroe stated that the property either belonged to Mrs. Farnsworth or the heirs, and for that reason my relatives came in claiming each \$500, two of them \$500 apiece on that property, and I didn't feel that it was going to them, so I refused to pay it, and of course, that kept the thing in litigation for several years, and we hadn't settled even yet when the Pickens suit came in. I made an agreement with my relatives at that time, when this

(Testimony of Minnie S. Farnsworth.)

present suit was entered, so we joined them as defendants in this case.

Q This receiver is still being held because there is money that must be paid to him in order to release claims held on the property by your relatives; is that the idea?

\* \* \*

MR. MERRIAM: I can clear that up, your Honor. The other relatives that had claimed an interest have quitclaimed their interest to Mrs. Farnsworth, and a judgment has been rendered by the court in accordance with the stipulation to that effect, decreeing the property in Mrs. Farnsworth; and in that connection she simply reimbursed or made some arrangement for reimbursing the other who had contributed toward this deficiency in the expenses; and when the others were claiming an interest, they contributed toward the expenses, and when they quitclaimed to her, she arranged to reimburse them for that amount, but the title is in her and judgment to that effect has been rendered. The only thing is that the receiver has not reported and made his final report and been discharged, simply because there has been no money on hand to close up the thing. The receiver, I guess, has received nothing, and always had to pay out every dollar he received, and asked Mrs. Farnsworth for more, and it has just been waiting. I think the only thing this litigation has to do with it is that this litigation has in a sense tied it up so that Mrs. Farnsworth could not refinance the mortgage or do anything of that kind, and

(Testimony of Minnie S. Farnsworth.)

there is a foreclosure suit pending now on the mortgage and they have been waiting for two or three years in order for this litigation to be ended, because when this litigation was begun, a notice of action pending was put on the record, which has practically tied up all of the property of Mrs. Farnsworth and her father, making it impossible for them to re-finance the matter -- make out a new mortgage or anything of that kind, until this litigation is over. Aside from that, the receiver has nothing to do with this litigation.

THE COURT: I see.

CHARLES GLAZE,

called on behalf of the defendants, testified as follows:

DIRECT EXAMINATION.

In September, 1909, I was Assistant Clerk in Department 2 of the Superior Court of Los Angeles County. My duties as such clerk required me to post notices in the matter of estates in probate in the said court. I had exclusive charge of posting notices at that time. Referring to Defendants' Exhibit V purporting to be a first and final account, report and petition for distribution in the matter of the estate of Jeanette Fensky, deceased, and to the endorsement on the back of that petition, stamps of this nature are put on the petitions at the time of the posting, setting for hearing, the posting itself being a notice to that effect. The stamp is put on before the posting. The notice which is posted is made out from the endorsement and the contents of the petition itself. In making out the notice for the purpose of posting, we take the date of



(Testimony of Charles Glaze.)

the hearing from the foot of the petition itself on the front and the date stamped in—filled in, is stamped on the back. By the front I mean the title and the rest of the items that are contained on the front of the cover at the bottom. That was my practice and custom as such clerk at that time.

The endorsement on Defendants' Exhibit W purporting to be the supplemental petition for distribution is a similar endorsement to the previous one that I testified to. What I have said regarding the making out of notices applies to that paper as well as to the one previously mentioned with the exception that the date here did not appear at the bottom of the front of the page, but it does appear on the stamp and I would make the notice as of the date on the stamp. I would say that after September 11, 1909, I did not post any notice in the matter of the estate of Jeanette Fensky of a hearing for final distribution. As far as I can find any reference of it, I did no posting after that date. On that date I posted the notice of hearing of the supplemental petition for final distribution. I could say approximately, but not absolutely, what the contents of that notice were. I have examined the register of actions in which entries in the matter of the estate of Jeanette Fensky, deceased, No. 13286 appear in the county clerk's office.

The defendants at this time offered in evidence a certified copy of the entries on the register of actions in the matter of the estate of Jeanette Fensky, de-

IN THE MATTER OF THE ESTATE )  
OF )  
JEANETTE FENSKY, Dec'd. )  
)

J. H. Merriam—Atty. for Petn.

Aug. 1, 1908 to Oct. 13, 1909

Aug. 1	Pet. for Prob. of Will filed	
" 1	Will filed	
Aug. 1	Nomination of Admr. filed	
" 5	Notice hearing Petn. for Pro. filed	
" 14	Will probated Bond 4700	138/234
" 14	Renunciation by Ex. filed	
" 14	Aff. of Pub. Notice hearing Petn. filed	
" 14	Testimony of subs. Wit filed	
" 14	Proof of mailing notice filed	
" 14	Bond filed	25/127
" 14	Order Pub. Notice to Crs. filed	14/315
" 14	Letters of admin. Will annexed filed	3/84
" 14	Certificate Proof of Will filed	42/22

Mar. 25	Petition for Authority to Endorse Water stock filed			
" 25	Consent of heirs & Creditors	"	"	"
	filed			146/156
" 25	Order authorizing adm. to endorse water stock filed			



(Testimony of Charles Glaze.)

———— as the same appear ——— of record, and that I have carefully compared the same with the original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Superior Court, this 25th day of July 1919.

ROY W. DOWDS, County Clerk.

(Seal) By C. Carlin, Deputy.

(Witness continuing):

I made the posting that I last spoke of on a blank provided for that purpose. I have such a blank with me. (Witness produces blank.) The word “supplemental” would be written above the line and a tick would be between the words “of” and “petition” so that it would read “hearing of supplemental petition.” This blank is similar in form to the blank we used in 1909.

The defendants offered in evidence the blank produced by the witness. The plaintiffs objected to the introduction of the same upon the ground that it was incompetent, irrelevant and immaterial, not the best evidence and calling for a conclusion of the witness. Objection overruled and exception noted.

The said blank was received in evidence and marked Defendants’ Exhibit I-1 and is as follows:

IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA IN AND FOR THE COUNTY  
OF LOS ANGELES.

_____	)	
In the Matter of the Estate of	)	Notice of Hearing of
	)	Petition for Final
_____	)	Distribution
		Deceased.



Notice is hereby given that the petition of \_\_\_\_\_  
 as \_\_\_\_\_ of the estate of \_\_\_\_\_ deceased, for  
 final distribution of said estate will be heard at 10  
 o'clock A.M., on the \_\_\_\_\_ day of \_\_\_\_\_  
 1911, at the Court Room of Department 2 of the Su-  
 perior Court of Los Angeles County, California.

Dated \_\_\_\_\_ 1911.

H. J. LELANDE, County Clerk.

By \_\_\_\_\_  
 Deputy.

STATE OF CALIFORNIA )

County of Los Angeles ) ss. AFFIDAVIT OF  
 POSTING

\_\_\_\_\_ being duly sworn, says, that on the  
 \_\_\_\_\_ day of \_\_\_\_\_ A. D. 1911, at the  
 request of the Clerk of the Superior Court of the  
 County of Los Angeles, he posted three notices, of  
 which the foregoing is a copy in three of the most  
 public places in the said County of Los Angeles, to wit:  
 One of the said notices at the County Clerk's office,  
 one at the County Recorder's Office, and one at the  
 place where the said Superior Court is held in the City  
 of Los Angeles.

Subscribed and sworn to before )  
 me this \_\_\_\_\_ day of \_\_\_\_\_ )  
 A.D. 1911. )

H. J. LELANDE, County Clerk.

By \_\_\_\_\_ Deputy.

Referring to Defendants' Exhibit H-1 and to the  
 entries appearing under date of September 11 and 13 at  
 the time I was Deputy Clerk, I would make up the no-

(Testimony of Charles Glaze.)

tices, fill out the affidavit on the back of the notice and Mr. Warren, who was the Clerk, would take my affidavit as to the posting, put the filing mark on, sign the filing mark and turn them into the Clerk's office and they would make the record from those papers. Whoever was charged with the duty of making the entries in the register of actions would make those entries from the papers found on file in the manner that I have indicated. The affidavit was put on the notice at the same time the notice was posted; that is, I would fill in the blanks on the front of the notice, turn it over, number and entitle it and write up the affidavit immediately. I would take the affidavit before Mr. Warren maybe that day, maybe the next day, maybe a day or two after I had done the work. At that time I would file the notice with the affidavit attached in the manner I have indicated. September 11 fell on Saturday.

THE WITNESS: If you will allow me to state something—it frequently happens that the papers do get misplaced and are found afterwards.

#### CROSS EXAMINATION.

I have no recollection now as to the contents of the notice that I say I posted on the 11th day of September. I know I posted a notice on the 11th of September by the record on the back of the petition itself and the record in the Register of Actions and the fact that I was the only one doing the posting at that time. The date inserted in the rubber stamp on the petition shows that I posted it on the 11th of September. Mr. Warren filled that out. There is none of my handwriting on

(Testimony of Charles Glaze.)

any of these documents. The Register of Actions was not posted by me either.

I can say that the blank notice of hearing marked Defendants' Exhibit I-1 is similar to the one we were using in 1909 because the blank is the same that we have been using for years with the exception of the clerk's signature. The change in the clerks would change the signature. I have compared the notice marked Defendants' Exhibit X with the form that is being used now. That form is very similar. I do not know whether this form is entirely different from the one they are using up there now. I have not compared those. I don't know whether there was any change made with those blanks. The blanks are similar in form, although there may be some change in the wording on the blank.

The plaintiffs offered in evidence "Notice of Settlement of Final account and hearing of petition for distribution. Affidavit of posting." The same was received in evidence and marked Plaintiffs' Exhibit 40. The same is as follows:

IN THE SUPERIOR COURT

of the State of California

in and for the County of Los Angeles.

_____	)	No. _____
In the Matter of the Estate of	)	Notice of Settle-
_____	)	ment of Final Ac-
Deceased.	)	count and Hear-
		ing of Petition for
		Distribution.

Notice is hereby given that the final account of \_\_\_\_\_ as \_\_\_\_\_ of the estate of \_\_\_\_\_, deceased, has been rendered; that a petition for the final distribution of said estate was filed with said account; that the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, at \_\_\_\_\_, o'clock — M., has been appointed as the time for the settlement of said account and the hearing of said petition for final distribution; and that said matters will be heard in the Superior Court of the State of California, in and for the County of Los Angeles, Department 2 thereof, at the time aforesaid.

Dated \_\_\_\_\_ 19\_\_\_\_.

ROY W. DOWDS, County Clerk.

By \_\_\_\_\_ Deputy.

State of California,        )  
County of Los Angeles ) ss.       AFFIDAVIT OF POSTING

\_\_\_\_\_ being duly sworn, says that on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, at the request of the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, he posted three notices, of which the foregoing is a copy, in three of the most public places in the said County of Los Angeles, to wit: One of the said notices at the County Clerk's office, one at the County Recorder's office, and one at the place where the said Superior Court is held in the County of Los Angeles.

Subscribed and sworn to before  
me this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

ROY W. DOWDS, County Clerk.

By \_\_\_\_\_ Deputy.



(Testimony of Charles Glaze.)

(Witness continuing):

All I can say is that, according to the best of my knowledge, that is the same form that was used at that time with the certain changes that I have stated. I could not swear positively that this blank was printed from the old form because I have not compared them, but to the best of my knowledge and belief it is the same form with the exception of the dates being filled in.

So far as the filling in of the blanks is concerned, I could not state what was contained in the notice. That was too far along.

Whereupon the defendants rested.

The foregoing constitutes and comprises all of the evidence introduced and all of the proceedings had and taken at the trial of the said action, and the complainants and the intervenor pray that the same be approved.

Emmet H. Wilson

Solicitor for Complainants  
and for Intervenor.

It appearing that the complainants in preparing their proposed statement of the evidence inserted portions of certain letters that were admitted in evidence and omitted certain portions thereof, and inserted in the said statement in condensed form certain accounts that were admitted in evidence, and the defendants deeming complete copies of the said letters and of the said accounts material, it was and is hereby ordered that the same

be set forth at length in the statement of the evidence herein.

It further appearing that the testimony of certain witnesses could not be fairly presented in condensed form, it is hereby ordered and directed that certain of the testimony of certain witnesses be reproduced in the foregoing statement in the exact words of the witnesses as in the said statement set forth.

It now appearing to the satisfaction of the court that the foregoing statement of the evidence is full, true, complete and properly prepared, the same is hereby approved.

DATED this 10th day of November, 1920.

Bledsoe

Judge.

It is hereby stipulated by and between the respective solicitors for the complainants and the intervenor, and for the defendants, that the foregoing contains all of the evidence introduced and all of the proceedings had and taken at the trial of the said action, and the same is hereby approved.

DATED this 10th day of November, 1920.

Emmet H. Wilson

Solicitor for Complainants  
and for Intervenor.

J. H. Merriam

Robert B. Murphey

Hunsaker, Britt & Cosgrove

Solicitors for Defendant.

[TITLE OF COURT AND CAUSE.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON  
APPEAL.

To the Clerk of the District Court of the United States, for the Southern District of California, Southern Division:

Please prepare and duly certify for the appeal of the complainants and the intervenor, to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree in the above entitled action in favor of the defendants, made and entered April 15th, 1920, a transcript incorporating the following portions of the record herein:

1. Bill of complaint.
2. Amended answer of Eugene Wellke, et al., excepting therefrom Exhibits 1 and 2, annexed thereto, the same to be omitted by stipulation filed herein.
3. Amended answer of J. H. Merriam, excepting therefrom Exhibits 1, 2 and 3, annexed thereto, the same to be omitted by stipulation filed herein.
4. Supplemental answer of Eugene Wellke, et al., excepting therefrom Exhibits 1, 2, 3, 4, 5 and 6, annexed thereto, the same to be omitted by stipulation filed herein.
5. Minute order allowing the amended petition in intervention and amendment to bill of complaint to be filed.
6. Amended petition in intervention.
7. Amendment to bill of complaint.
8. Opinion of the court.
9. Decree entered April 15th, 1920.

10. Assignment of errors.
11. Petition for allowance of appeal and order allowing appeal.
12. Bond on appeal.
13. Citation.
14. Stipulation to omit certain matters from printed transcript of record on appeal.
15. Condensed statement of the evidence.
16. This praecipe.

DATED THIS            day of August, 1920.

Emmet H. Wilson

Solicitor for Complainants and Intervenor.

Endorsed: Receipt of a copy of the within is hereby admitted this 16th day of August, 1920 J. H. Merriam, Hunsaker, Britt & Cosgrove attorneys for defendants.

Filed Aug 16 1920 Chas. N. Williams, Clerk by  
R. S. Zimmerman Deputy Clerk.





IN THE DISTRICT COURT OF THE UNITED  
STATES SOUTHERN DISTRICT OF  
CALIFORNIA (SOUTHERN  
DIVISION)

Louisa Pickens and Johanna Schutt, Complainants,  
vs {No. B. 15 Eq

J. H. Merriam, Eugene Wellke, Alma J. Schmidt,  
Amanda Katzung, Minnie S. Farnsworth, Corrine  
Loveland and Don Ferguson,

Defendants.

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 751 pages numbered from 1 to 751 inclusive, to be the Transcript on Appeal in the above-entitled cause, as printed and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the bill of complaint, amended answer of Eugene Wellke, et al., excepting therefrom Exhibits 1 and 2, annexed thereto, amended answer of J. H. Merriam, excepting therefrom Exhibits 1, 2 and 3, annexed thereto, Supplemental answer of Eugene Wellke, et al., excepting therefrom Exhibits 1, 2, 3, 4, 5 and 6, annexed thereto, minute order allowing the amended petition in intervention and amendment to bill of complaint to be filed, amended petition in intervention, amendment to bill of complaint, opinion of the court, decree entered April 15th, 1920, assignment of errors, petition for allowance of appeal and order allowing appeal, bond on appeal.

citation, stipulation to omit certain matters from printed transcript of record on appeal, condensed statement of the evidence and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on appeal, amount to \_\_\_\_\_, and that said amount has been paid me by the complainants herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this \_\_\_\_\_ day of December in the year of our Lord One Thousand Nine Hundred and Twenty, and of our Independence the One Hundred and Forty-fifth.

CHAS N. WILLIAMS,

Clerk of the District Court of the United States of America, in and for the Southern District of California

By \_\_\_\_\_

Deputy Clerk

No. 3624.

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IN THE

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United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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Louisa Pickens et al.,

*Appellants,*

*vs.*

J. H. Merriam et al.,

*Appellees.*

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BRIEF OF APPELLANTS.

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FRANCIS G. BURKE,  
Trust & Sav. Bldg., 6th & Spring, Los Angeles,  
*Attorney for Complainants and*  
*Appellants and Intervenor.*





**No. 3624.**

IN THE

**United States**

**Circuit Court of Appeals,**

**FOR THE NINTH CIRCUIT.**

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Louisa Pickens et al.,

*Appellants,*

*vs.*

J. H. Merriam et al.,

*Appellees.*

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**BRIEF OF APPELLANTS.**

This is the second appeal in this action. Upon the first appeal a decree of dismissal, entered upon a motion of the defendants to dismiss, was reversed.

Pickens v. Merriam, 242 Fed. 363.

[Petition for rehearing of Appellee Merriam denied.]

Upon reversal the appellees here answered and the cause was tried, resulting in a decree of dismissal [Tr. pp. 194-200], from which this appeal is taken.

Charles F. Fensky was by order of the court allowed to become intervenor and filed his complaint in intervention seeking similar relief to that of the complainants. [Tr. pp. 186-191.]

### STATEMENT OF THE CASE.

This is an action brought by the appellants to compel an accounting, on the part of the defendants, for certain property belonging to the estate of Ferdinand Fensky, deceased, and to the estate of Jeanette Fensky, deceased; to have certain releases and quit-claims executed by the complainants and the father of the intervenor adjudged to be void by reason of the fact that they were obtained through misrepresentation and fraud; to require the appellee, Merriam, administrator of the estate of Jeanette Fensky, to account to the appellants for their respective distributive shares of the said estate; to have certain deeds signed by the said Jeanette Fensky in her lifetime, purporting to convey certain real property to certain of the defendants, declared to be void; to have the defendants declared to hold the said property as trustees for the appellants, because of sundry fraudulent acts of the defendants and Jeanette Fensky and wrongfully withheld by them from the appellants; and for general relief. [Tr. pp. 3-27-29.] The appellants are lawful heirs of the said decedents, the complainants being sisters of the said Ferdinand Fensky and the intervenor being the sole surviving heir of a deceased

brother of the said Ferdinand Fensky. [Tr. pp. 266, 267.]

The facts are as follows:

The appellants Louisa Pickens, Johanna Schutt and Charles F. Fensky are, and have been for many years, residents and citizens, respectively, of the states of Kansas, Nebraska and Missouri. [Tr. pp. 266, 267.]

Ferdinand Fensky died intestate in Los Angeles county, state of California, on August 7th, 1903, leaving property in California, and in Topeka, Kansas, consisting of real property described in the complaint located in the counties of Los Angeles and Orange, state of California, and personal property consisting of promissory notes, mortgages and contracts for the sale of real property located in Topeka, Shawnee county, Kansas, cash in bank and in the hands of agents amounting to about \$6,500, and that the entire property belonging to Ferdinand Fensky at the time of his death was worth about \$80,000.

That at the time of the death of Ferdinand Fensky various persons in the state of Kansas were indebted to him on account of purchase money on real estate sold by him to said persons under the said contracts before mentioned, whereby he agreed to convey the real estate when the purchase price named in the contract was fully paid, and that at the time of his death there was unpaid a large amount under such contracts. That prior to his death the said Ferdinand Fensky and Jeanette Fensky executed deeds to contract purchasers but did not deliver the same.

That in October, 1903, Jeanette Fensky was appointed by the Superior Court of the county of Los Angeles, state of California, administratrix of the estate of Ferdinand Fensky, and that one M. T. Campbell, then residing at Topeka, Kansas, the agent and representative of the said Jeanette Fensky, was, on October 22nd, 1903, appointed administrator of the estate of the said Ferdinand Fensky by the Probate Court at Shawnee county, Kansas.

That after the appointment of the said Jeanette Fensky as administratrix, she came into possession of said promissory notes and cash in excess of \$5,000 and of said real estate, and with the intent of deceiving and defrauding the plaintiffs and other heirs of Ferdinand Fensky, she caused the California real estate to be appraised and inventoried in the total sum of \$6,000, and the personal property in the sum of \$400, and purposely failed to list and inventory the cash and other personal property in her possession belonging to the said estate, and filed the said false inventory and appraisal.

That the said M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, filed in the county of Shawnee, state of Kansas, an inventory purporting to contain all the property coming into his hands as administrator of such estate, but purposely omitting from said inventory many of the notes and other personal property belonging thereto.

That the said Jeanette Fensky and M. T. Campbell entered into a fraudulent and collusive agreement for



the purpose of defrauding these plaintiffs and procuring from them their said interest in the estate of said Ferdinand Fensky without adequate consideration.

That pursuant to said scheme to defraud plaintiffs, said Campbell omitted from his said inventory any reference to any indebtedness due the said estate from purchasers of real property and listed the said real property as a portion of the estate of Ferdinand Fensky for the reason that the laws of the state of Kansas provided that real estate of an intestate husband dying without children descends directly to his widow, and no part of the same descends to the next of kin, and that the said Campbell and said Jeanette Fensky concealed the indebtedness due the said estate from the purchasers of said property.

That thereafter the said Jeanette Fensky delivered the deeds executed by the said Ferdinand Fensky in his lifetime to the said property to the said purchasers and received the money thereon due the estate of Ferdinand Fensky, or took mortgages back payable to herself, but did not cause the said money to be paid into the said estate of Ferdinand Fensky, but converted the same to her own use and benefit; nor did she ever account to the estate of said Ferdinand Fensky for the said mortgages.

That by means of the said false inventories filed in the estate of Ferdinand Fensky, deceased, in the states of California and Kansas, as aforesaid, and by false statements to these plaintiffs, the said Jeanette Fensky and the said Campbell represented that the estate of

said Ferdinand Fensky consisted only of property in California of the value of about \$6,000 and property in the hands of Campbell amounting to about \$20,000, when in truth and in fact, the California real estate owned by the said intestate at the time of his death was worth about \$20,000 and the personal property in the hands of the said Jeanette Fensky was of the value of more than \$50,000, and the personal property, including that which the said Jeanette Fensky had turned over to the said Campbell, in the state of Kansas, was of the value of more than \$60,000.

That the said Campbell further represented to these plaintiffs that it would take a long time to close up the estate of Ferdinand Fensky; that many of the notes inventoried were of little and doubtful value, and that the cost of administration would amount to a considerable sum and that the amount that each of the plaintiffs might be entitled would not exceed the sum of \$1,000; that the real estate in the state of Kansas belonging to the intestate all went to the widow and all the property left by the intestate was community property, and that if they wanted their share the said Jeanette Fensky would buy their said share for \$1,000 each.

All of which statements were false and made for the purpose of inducing these plaintiffs to accept the proposition of the said Jeanette Fensky for the purchase of their interest in the said estate.

That at the time the said representations were made neither of the plaintiffs had any knowledge of the

actual facts as set out in the complaint, but relied upon the inventories filed in the said estate, and the representations so made to them, and believing the same to be true, accepted the sum of \$1,000 each from the said Jeanette Fensky and executed to her releases and quitclaim deeds conveying to her all their right, title and interest in the said estate of their said deceased brother, Ferdinand Fensky.

That the said sum of \$1,000 so paid to each of them was paid out of funds in the hands of the said Jeanette Fensky and the said Campbell belonging to the said estate of Ferdinand Fensky.

That the said Jeanette Fensky died in Los Angeles, California, July 8th, 1908. At the time of her death she was the owner of certain real estate described in the complaint and that all of the same had been purchased by her with money derived from the estate of Ferdinand Fensky.

That prior to her death the said Jeanette Fensky signed deeds to the said real estate, naming therein as grantees certain and various defendants in this action, but that the said deeds were not delivered to the said grantees.

That after the death of Jeanette Fensky the defendant J. H. Merriam, of Los Angeles, state of California, was appointed as administrator of her estate. That said J. H. Merriam filed an inventory in which it appears that the total assets of the said estate of Jeanette Fensky amounted to about \$3,500, consisting entirely of personal property. That none of the said real estate

belonging to the said Jeanette Fensky at the time of her death, and described in the complaint, was inventoried in the said estate, nor was the same distributed by the said Superior Court of said Los Angeles county. He also omitted from said inventory and accounts the note of W. C. Stein, a note of Campbell and a note of George Fensky and a portion of the monies in the bank.

That the said J. H. Merriam was fully advised of the property belonging to the said Jeanette Fensky at the time of her death and had full knowledge of the rights of the complainants herein.

That after the estate had been closed the said J. H. Merriam was requested to continue the administration of the said estate, but failed, refused and neglected so to do.

All the estate of Ferdinand Fensky was at the time of his death his separate property, and as such, on the death of his widow, the estate in her hands descended ratably to the surviving brothers and sisters of the said Ferdinand Fensky.

That plaintiffs have received nothing from the estate of their said deceased brother Ferdinand Fensky, excepting said sum of \$1,000 each.

That neither of the complainants ever had any notice of the fraud so perpetrated upon them until July, 1912. That thereupon they commenced an investigation which developed the facts as hereinbefore set forth.

The complaint prays that an account be taken of all the property of the said Ferdinand Fensky, deceased;



That the pretended deeds of release and of claim executed by these claimants to the said Jeanette Fensky be declared fraudulent and void and of no effect, and that an account be taken of the estate of said Jeanette Fensky.

That the deeds of Jeanette Fensky to the other defendants be decreed null and void and that the defendant J. H. Merriam be required to account to the plaintiffs for their distributive share of the said estate of Jeanette Fensky, and for such other, further and general relief as to the court may seem equitable and just.

There is no conflict in the evidence concerning the facts as to any material circumstance. The greater portion of the evidence is in documentary form, and this court has the same means of judging the same as had the trial court.

### **Specification of Errors.**

The appellants now assign the following errors which the said appellants aver occurred in the proceedings in and upon the trial of this cause and particularly appearing in the record herein upon which they rely to reverse the decree rendered and entered herein, and the appellants aver that in the record and proceedings of this cause there is manifest error and the said decree is erroneous and is against the just rights of the appellants in the following respects:

The court erred in the following particulars, to-wit:

1. In not decreeing that the complainant, Louisa Pickens, was at the time of the filing of the bill of



complaint herein a citizen and resident of the state of Kansas.

2. In not decreeing that the complainant, Johanna Schutt, was at the time of the filing of the bill of complaint herein a citizen and resident of the state of Nebraska.

3. In not decreeing that the intervenor, Charles F. Fensky, was and is the only son and heir at law of Charles Fensky, and that the said Charles F. Fensky was, at the time of the filing of the bill of complaint herein and at the time of the filing of the amended petition for intervention herein, a citizen and resident of the state of Missouri.

4. In not decreeing that at the time of the filing of the bill of complaint herein the defendants were all citizens and residents of the state of California and of the Southern District and Division thereof.

5. In not decreeing that the real estate described in the bill of complaint, and in the amended bill of complaint, herein was situated in the state of California and in the Southern District and Division thereof.

6. In not decreeing that the amount in controversy in this action exceeds and exceeded the sum or value of \$3,000.00, exclusive of interest and costs.

7. In not decreeing that the complainants herein are surviving sisters and heirs at law of Ferdinand Fensky, who died intestate at San Pedro, Los Angeles county, California, on August 7th, 1903.

8. In not decreeing that the said Ferdinand Fensky never had any children and that he left as his only heirs at law the complainants, Louisa Pickens and Johanna Schutt, both sisters of the decedent; Jeanette Fensky, his widow, who died prior to the filing of the bill of complaint herein; Frederick Fensky, a brother; Ida Wendt, a sister, who died prior to the filing of the said bill of complaint; Hulda Richter, a sister; Augusta Krauss, a sister; Charles Fensky, a brother, and George Fensky, a son of a brother of the said decedent who died during the lifetime of the said Ferdinand Fensky.

9. In not decreeing that the said Ida Wendt died, intestate, subsequently to the death of the said Ferdinand Fensky, and that she left a son, Conrad Wendt, as her sole heir at law, and that after the death of the said Ferdinand Fensky, and of the said Ida Wendt, and prior to the filing of the bill of complaint herein, the said Conrad Wendt died unmarried, intestate and without issue or direct heirs.

10. In not decreeing that subsequently to the death of the said Ferdinand Fensky, the said Charles Fensky died, intestate, leaving the intervenor, Charles F. Fensky, as his sole surviving heir at law and next of kin, and the said Charles F. Fensky succeeded to all of the interest of the said deceased Charles Fensky in and to the estate of the said Ferdinand Fensky.

11. In not decreeing that each of the complainants, Louisa Pickens and Johanna Schutt, as maternal aunt of the said Conrad Wendt, succeeded to one-seventh of

the interest of the said Ida Wendt in the estate of the said Ferdinand Fensky, deceased, and in the property described in the bill of complaint herein.

12. In not decreeing that the intervenor, Charles F. Fensky, succeeded to one-seventh of the interest of the said Ida Wendt in the estate of the said Ferdinand Fensky, deceased, and in the property described in the bill of complaint herein.

13. In not decreeing that at the time of the death of the said Ferdinand Fensky, he was the owner of the following described real estate, to-wit:

(A) A piece or parcel of land situated in the city of Los Angeles, California, being as follows: Commencing at a point on the west line of New High street distant 200 feet southwest from the southwest corner of Alpine street and New High street; thence southwesterly along the west line of New High street 73 feet to a point; thence westerly at right angles to said west line of New High street 65 feet to a point; thence northeasterly at right angles to the last mentioned course parallel with and distant from the west line of New High street 73 feet to a point; thence 65 feet easterly to the west line of New High street to the point of beginning; being parts of lots 10 and 11 in block 33, of Ord's Survey, as recorded in book 55, page 66, miscellaneous records of Los Angeles county, California.

(B) Lots 19 to 29 inclusive in block C, Peck's Subdivision of the Carolina Tract in the city of San Pedro, Los Angeles county, California.

(C) Lots 9 and 10 of Peck's Subdivision of block 74 in said city of San Pedro, Los Angeles county, California.

(D) The west half of the southwest quarter of the northwest quarter of section 24, township 5 south, range 10 west, S. B. M., in Orange county, California.

(E) The north ten (10) acres of the southwest quarter of the southeast quarter and the south half of the northwest quarter of the southeast quarter of section 4, township 5 south, range 10 west, S. B. M., in Orange county, California.

14. In not decreeing that about two or three months before the death of the said Ferdinand Fensky, he sold to one John Davis, under contract of sale, the south thirty (30) acres of the southwest quarter of the southeast quarter of section 4, township 5 south, range 10 west, S. B. M., in Orange county, California, for the sum of \$1,700.00; that the said Davis paid the sum of \$50.00 to the said Ferdinand Fensky, and paid the remainder of the purchase price to Jeanette Fensky, or her agent, after the death of Ferdinand Fensky.

15. In not decreeing that at the time of the death of the said Ferdinand Fensky, he owned and possessed promissory notes aggregating about \$24,647.64 in face value, executed by various persons and payable at various times, as set forth in the said notes.

16. In not decreeing that at the time of the death of the said Ferdinand Fensky, various persons were indebted to him on account of purchase money on real estate sold by him to such persons during his lifetime.



17. In not decreeing that at the times the said real estate was sold the said Ferdinand Fensky executed to the purchasers thereof contracts for deeds whereby he agreed to convey the real estate described therein upon the full payment of the purchase price.

18. In not decreeing that at the time of the death of the said Ferdinand Fensky, there was unpaid a large amount of the purchase price of the various pieces of real estate sold by the said Ferdinand Fensky on contract of sale during his lifetime.

19. In not decreeing that at the time of the death of the said Ferdinand Fensky there was unpaid on account of contracts for the sale of real estate executed by the said Ferdinand Fensky in his lifetime, covering real property owned by him in his own right in Topeka, Shawnee county, Kansas, the total sum of about \$22,965.75.

20. In not decreeing that Jeanette Fensky, the wife of Ferdinand Fensky, joined with the said Ferdinand Fensky in the execution of all contracts for the sale of real estate executed by the said Ferdinand Fensky, and that she consented in writing to the execution of all such contracts executed by the said Ferdinand Fensky.

21. In not decreeing that at the time of the death of the said Ferdinand Fensky, he possessed cash in the bank and in the possession of other persons amounting to about \$2,756.57.



22. In not decreeing that at the time of the filing of the inventory and appraisement of the estate of Ferdinand Fensky, deceased, lots 19 to 29 inclusive in block C of the Peck's Subdivision of the Carolina Tract in the city of San Pedro, Los Angeles county, California, were reasonably worth the sum of \$4,000.00.

23. In not decreeing that at the time of the filing of the inventory and appraisement of the estate of Ferdinand Fensky, deceased, lots 9 and 10 of Peck's Subdivision of block 74, in the city of San Pedro, Los Angeles county, California, was reasonably worth the sum of \$10,000.00.

24. In not decreeing that at the time of the filing of the inventory and appraisement of the estate of Ferdinand Fensky, deceased, the west half of the southwest quarter of the northwest quarter of section 24, T. 5 S., R. 10 W., S. B. M., in Orange county, California, was reasonably worth the sum of \$1,000.00.

25. In not decreeing that at the time of the filing of the inventory and appraisement of the estate of Ferdinand Fensky, deceased, the north ten (10) acres of the southwest quarter of the southeast quarter and the south half of the northwest quarter of the southeast quarter of section 4, T. 5 S., R. 10 W., S. B. M., in Orange county, California, was reasonably worth the sum of \$1,500.00.

26. In not decreeing that at the time of the filing of the inventory and appraisement of the estate of

Ferdinand Fensky, deceased, the contract of sale to John Davis for the south thirty (30) acres of the southwest quarter of the southeast quarter of section 4, T. 5 S., R. 10 W., S. B. M., in Orange county, California, was reasonably worth the sum of \$1,650.00.

27. In not decreeing that at the time of the filing of the inventory and appraisement of the estate of Ferdinand Fensky, deceased, the whole of the property and estate owned and possessed by the said Ferdinand Fensky at the time of his death was reasonably worth the sum of about \$86,869.96.

28. In not decreeing that on October 15th, 1903, Jeanette Fensky was, by the Superior Court of the state of California, in and for the county of Los Angeles, appointed, and that she became administratrix of the estate of the said Ferdinand Fensky, deceased, and that she duly qualified and thereafter acted as such until the final settlement of the said estate.

29. In not decreeing that upon the death of the said Ferdinand Fensky, the said Jeanette Fensky came into the possession of about the sum of \$2,756.57 in cash and promissory notes aggregating a total of about \$24,647.64 and that she came into possession of all of the contracts of sale of real estate and of all evidences of indebtedness due to the said Ferdinand Fensky at the time of his death, upon which there was then owing and unpaid about the sum of \$22,965.75.

30. In not decreeing that, as administratrix of the estate of the said Ferdinand Fensky, deceased, the said Jeanette Fensky came into possession of the real estate

owned by the said decedent at the time of his death in the state of California.

31. In not decreeing that the said Jeanette Fensky knew the value of the said real estate in the state of California, and the contract of sale to John Davis, to be about the sum of \$28,750.00, and, designing to deceive and to defraud the complainants and the other heirs at law of the said Ferdinand Fensky, deceased, the said Jeanette Fensky caused the said real estate in California to be falsely and fraudulently appraised and inventoried for a total sum of \$6,200.00.

32. In not decreeing that the said Jeanette Fensky, as administratrix of the estate of the said Ferdinand Fensky, deceased, did not return to the said Superior Court a true inventory of the personal property belonging to the said estate and that she inventoried only one promissory note for the sum of \$400.00, and did not inventory any of the other promissory notes or any of the contracts for the sale of real estate or other evidences of indebtedness belonging and owing to Ferdinand Fensky at the time of his death, or then belonging and owing to the said estate.

33. In not decreeing that the said Jeanette Fensky, with a design to mislead, deceive and defraud the complainants and the other heirs of the said Ferdinand Fensky, deceased, purposely failed to list and inventory any cash belonging to the said decedent which came into her possession, and also purposely failed to inventory any contracts or other evidences of indebt-

edness due to the said decedent from purchasers of real estate.

34. In not decreeing that the inventory of the estate of the said Ferdinand Fensky, deceased, was signed by the said Jeanette Fensky as administratrix of the said estate of Ferdinand Fensky, deceased, and was by her presented to the Superior Court of the state of California, in and for the county of Los Angeles, as and for a true inventory of the estate of the said decedent, and that in truth and in fact the same was false and fraudulent and did not contain a large amount of property belonging to the said estate, and that the said inventory was intended by the said Jeanette Fensky to deceive the complainants as sisters and heirs at law and the other heirs of the said Ferdinand Fensky, deceased, including Charles Fensky, into the belief that the said estate consisted of nothing but the property in the said inventory and appraisement described and valued in the said inventory and appraisement and thereby to induce the said complainants and the said Charles Fensky and the other heirs to relinquish their just claims to their respective shares of the said estate.

35. In not decreeing that after the death of the said Ferdinand Fensky, the said Jeanette Fensky, with the design to deceive and to defraud the complainants and the other heirs at law of the said Ferdinand Fensky, deceased, including the said Charles Fensky, sent all of the promissory notes and all contracts and all



evidences of indebtedness due to the said Ferdinand Fensky, deceased, to M. T. Campbell, who then resided at Topeka, Shawnee county, Kansas; that the said M. T. Campbell was the agent and representative in the said state of Kansas of the said Jeanette Fensky; that the said Jeanette Fensky entered into a fraudulent and collusive agreement with the said Campbell, whereby he should act as her agent and representative in obtaining releases from the complainants and the said Charles Fensky and the other heirs at law of the said Ferdinand Fensky, deceased; that pursuant to such agreement, and for the purpose of carrying it out, the said Jeanette Fensky procured the said Campbell, by virtue of certain proceedings in the Probate Court of Shawnee county, Kansas, which was a court of record, then and there having jurisdiction of estates of deceased persons, to be, and he was, on September 9th, 1903, appointed administrator of the estate of the said Ferdinand Fensky, deceased.

36. In not decreeing that on or about October 22nd, 1903, M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, filed in the Probate Court of Shawnee county, Kansas, an inventory which was represented by him to be a true inventory of all the goods, chattels, rights and credits of Ferdinand Fensky, deceased, which were by law to be administered in Kansas, and also an inventory of the real estate of Ferdinand Fensky, which said inventory showed personal property amounting to \$20,927.64, consisting of \$4,297.14 cash in hand, and showed a



portion, but not all, of the promissory notes owing and belonging to the said estate, and that the said Campbell wholly failed to list in the said inventory a promissory note signed by W. C. Stein for the sum of \$2,400.00 and a promissory note executed by one Simms for the sum of \$420.00 and a promissory note executed by one Kimmerle for the sum of \$500.00, and that the said Campbell purposely omitted from the said inventory any reference to any indebtedness due to the said estate from purchasers of real estate under contracts of sale in Shawnee county, Kansas.

37. In not decreeing that the real estate sold by Ferdinand Fensky during his lifetime, and for which the purchasers thereof were indebted to him, and after his death to his estate, was situated in and near the city of Topeka, Shawnee county, Kansas, and consisted in part of what was known as Fensky's First and Second Additions, about twelve acres in Kaw Reserve number 5, lot 61 on Kansas Avenue South, and part of lot 71 on Kansas Avenue North.

38. In not decreeing that the Kansas law regulating the descent and distribution of property at the time of the death of Ferdinand Fensky and at the time of the filing of the inventory of the estate of Ferdinand Fensky, deceased, in the Probate Court of Shawnee county, Kansas, provided that real estate of an intestate husband dying without children descends directly to his widow and no part thereof descends to his next of kin, and that, well knowing the provisions of the said law, and pursuing a design to deceive and to de-

fraud the complainants herein and the said Charles Fensky and the other heirs at law of the said Ferdinand Fensky, deceased, the said Jeanette Fensky and M. T. Campbell listed as real estate in the inventory filed in the Probate Court of Shawnee county, Kansas, the real estate sold by the said Ferdinand Fensky in his lifetime under contracts of sale to purchasers of the said real estate; that the said Jeanette Fensky and the said M. T. Campbell knew that none of the contracts of sale of the said real estate had been recorded and knew that the complainants and the said Charles Fensky and the other heirs at law had no knowledge that the said real estate had been sold, and that the said Jeanette Fensky and the said Campbell concealed the fact that any of the said real estate had been sold, and, by listing the same as real estate, falsely represented to the complainants and to the said Charles Fensky and to the other heirs at law of the said Ferdinand Fensky, deceased, that, under the laws of the state of Kansas, the real estate so sold belonged to the widow of the said Ferdinand Fensky, deceased, and that the complainants and the said Charles Fensky and the other heirs at law of the said Ferdinand Fensky, deceased, had no interest therein.

39. In not decreeing that it was the duty of Jeanette Fensky, as administratrix of the estate of the said Ferdinand Fensky, deceased, in California, and that it was the duty of M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, under the laws of both California and Kan-

sas, to inventory and to account for the indebtedness due to the said estate from purchasers of real estate under contracts of sale as personal assets of the said Ferdinand Fensky, deceased, distributable according to the law of California applicable to separate property of a deceased husband dying in California without issue, and leaving a widow and brothers and sisters.

40. In not decreeing that for the purpose of carrying out the fraudulent design of securing from the complainants and from the said Charles Fensky and from the other heirs at law of the said Ferdinand Fensky, deceased, by misrepresentation and fraud, a release of their lawful claims against the said estate, Jeanette Fensky and M. T. Campbell concealed from the said complainants and from the said Charles Fensky and from the other heirs at law, the existence of any indebtedness owing to the said estate from purchasers under contracts of sale of real estate and omitted from the inventory of the said estate in California, and from the inventory of the said estate in Kansas, all indebtedness owing to the said estate on account of contracts of sale of real estate, and stated in the said inventories and otherwise that the said estate was actually Kansas real estate owned by the said Ferdinand Fensky, deceased, at the time of his death, and as such descended to and belonged solely to the said Jeanette Fensky.

41. In not decreeing that under the laws of the state of Kansas where a vendor in a contract of sale of real estate dies without having executed a deed to

the purchaser upon the payment to the administrator of his estate of the unpaid balance of the purchase money, the administrator was and is authorized, and might and may be directed by the Probate Court to execute such deed with the same effect as though it had been executed by the vendor; that; prior to his death, the said Ferdinand Fensky and the said Jeanette Fensky drew up and signed deeds of conveyance to the several purchasers holding contracts of sale of real estate from the said Ferdinand Fensky, but did not deliver the same; that all of the said undelivered deeds came into the hands of the said Jeanette Fensky upon the death of the said Ferdinand Fensky; that the said Jeanette Fensky and M. T. Campbell knew that the execution by the said Jeanette Fensky or by the said Campbell, as administrator of the estate of the said Ferdinand Fensky of the deeds to the said purchasers, or any of them, would reveal the fact that the said real estate had been sold and that the purchase money unpaid on account of contracts of sale constituted personal property of the said estate; that the said Jeanette Fensky and the said Campbell soon after the appointment of Jeanette Fensky as administratrix of the estate of Ferdinand Fensky, deceased, in California, and the appointment of the said Campbell as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, began negotiations with the persons who, during the lifetime of the said Ferdinand Fensky, had purchased real estate from him in Kansas under contracts of sale to accept the said undelivered



deeds notwithstanding the death of the said Ferdinand Fensky, and to execute to the said Jeanette Fensky mortgages for the amount of the unpaid purchase money due under the said respective contracts of sale; that substantially all of the persons who had purchased real estate from the said Ferdinand Fensky under contracts of sale accepted the said proposition, and the said deeds, all of which were dated, signed and acknowledged prior to the death of the said Ferdinand Fensky, were by the said Jeanette Fensky, through the said Campbell, delivered to the said respective purchasers and they executed to the said Jeanette Fensky mortgages for the respective unpaid balances of the purchase money; that the said Jeanette Fensky and the said Campbell for the purpose of deceiving and defrauding the complainants and the said Charles Fensky and the other heirs at law of the said Ferdinand Fensky, deceased, and for the purpose of inducing the said complainants and the said Charles Fensky and the other heirs at law to relinquish their just claims to their respective shares of the estate of the said Ferdinand Fensky, deceased, omitted from the inventory of the said estate in Kansas and from the inventory of the said estate in California any reference to any of the said mortgages, and that neither the said Jeanette Fensky nor the said Campbell, nor anyone else representing the estate of the said Ferdinand Fensky, accounted to the complainants or to the said Charles Fensky, or to the other heirs at law for any part or share of the said mortgages, or any of them,



or the proceeds thereof, and that the same remain and are unadministered assets of the estate of the said Ferdinand Fensky, deceased, in which the complainants and the intervenor and the other heirs at law had and have an interest as heirs at law of the said decedent.

42. In not decreeing that by means of the inventory filed by Jeanette Fensky in the estate of Ferdinand Fensky, deceased, in the Superior Court of the state of California, in and for the county of Los Angeles, and by means of the inventory filed by M. T. Campbell in the estate of Ferdinand Fensky, deceased, in the Probate Court of Shawnee county, Kansas, and by written statements made by them, and by oral statements made by the said Campbell, they represented that the estate of the said Ferdinand Fensky consisted of property situated in California of the value of about \$6,700.00 and property in the hands of the said Campbell amounting to about \$20,927.64, and represented that of the said estate, the widow, Jeanette Fensky, was entitled to one-half and that the remaining half was subject to distribution among the other heirs at law of the said Ferdinand Fensky, deceased, and represented that, according to the inventories prepared by them, the widow would receive about \$10,000.00 from the property in the hands of the said Campbell and about \$3,000.00 from property in her hands in California, and in addition thereto that the widow was entitled to the real estate situated in the state of Kansas described in the said Campbell's inventory filed

in the estate of Ferdinand Fensky, deceased, in the Probate Court of Shawnee county, Kansas; that the said Jeanette Fensky and the said M. T. Campbell well knew, and it was a fact, that the California real estate owned by the said Ferdinand Fensky at the time of his death was worth about \$28,750.00, and the personal property in California in the hands of the said Jeanette Fensky, including that which the said Jeanette Fensky turned over to the said Campbell for administration in the state of Kansas, was of the total value of about \$50,469.96; that almost immediately after the death of the said Ferdinand Fensky, the said Campbell began the collection of moneys due on account of promissory notes owing to the said Ferdinand Fensky and on account of contracts of sale of real estate made by the said Ferdinand Fensky in his lifetime; that prior to July, 1904, the said Campbell had collected of assets belonging to the estate of the said Ferdinand Fensky, deceased, either in cash or well secured mortgage notes, more than \$11,800.00; that from time to time the said Campbell without the knowledge or consent of the complainants, or of the said Charles Fensky, or of any of the other heirs at law of the said Ferdinand Fensky, deceased, remitted to the said Jeanette Fensky large sums of money and retained other large sums of money in his hands for the purpose of carrying out the design and intent of securing for the said Jeanette Fensky the shares of the estate of the said Ferdinand Fensky, deceased, to which the complainants and the said Charles Fensky

and the other heirs at law were justly entitled; that within a short time after the appointment of the said Campbell as administrator of the estate of Ferdinand Fensky, deceased, in the state of Kansas, he represented to the complainants, and to the said Charles Fensky, and to the other heirs at law of the said Ferdinand Fensky, deceased, that it would take a long time to close up the estate of the said Ferdinand Fensky and that many of the promissory notes inventoried by him were of little or doubtful value, and that the makers of the said notes were accustomed to taking time for the payment of the same, and that the cost of administration would amount to a considerable sum, and that even if he should be able to collect the said notes, the shares of the said estate to which each of the complainants and the said Charles Fensky might be entitled would not exceed the sum of \$1,000.00; that the said Campbell further represented that the real estate in and near Topeka, Kansas, all went to the widow, and that the property left by the said Ferdinand Fensky, deceased, was community property to which the said Jeanette Fensky was entitled to one-half absolutely, and that if the said complainants and the said Charles Fensky and the other heirs at law wanted their shares, the said Jeanette Fensky would buy from the complainants and from the said Charles Fensky their claims against the said estate for \$1,000.00 each; that each, all and every of the said representations was false, fraudulent and misleading and was by the said Campbell and by the said Jeanette

Fensky known to be false, fraudulent and misleading; that the said promissory notes were all good and collectible; that the said Ferdinand Fensky left no debts and there was no just reason why the estate should not be closed, and final distribution made within reasonable time; that the amount which the complainants and the said Charles Fensky and the other heirs at law of the said Ferdinand Fensky, deceased, were entitled to receive from the said estate upon a full disclosure and accounting was about the sum of \$4,951.25 each; that the said property left by the said Ferdinand Fensky was not community property, but was his separate property; that the cost of administration ought to have been comparatively small and not exceeding the amount authorized by law; that the value of the estate was about \$86,869.96, instead of about \$24,000.00 as represented by the said Campbell and the said Jeanette Fensky; that, at the time the aforesaid representations were made, the complainants and the said Charles Fensky and the other heirs at law had no knowledge of the actual facts as herein stated, but relied upon the said inventories and the said representations so made to them and believed the same; that, believing the said representations, the complainant, Louisa Pickens, on or about July 29th, 1904, accepted the sum of \$1,000.00 then paid to her by the said Campbell, and signed and delivered to him for the said Jeanette Fensky a transfer, release and quitclaim conveying to the said Jeanette Fensky of all the right, title and interest of the said Louisa Pickens in and to all property



of the estate of the said Ferdinand Fensky, deceased; that on or about August 3rd, 1904, the complainant, Johanna Schutt, relying on and believing the said inventories and the said representations made to her, accepted the sum of \$1,000.00 then paid to her by the said Campbell and signed and delivered to him for the said Jeanette Fensky a transfer, release and quitclaim conveying to the said Jeanette Fensky all the right, title and interest of the said Johanna Schutt in and to all property, assets and estate of the said Ferdinand Fensky, deceased; that on or about the 25th day of July, 1904, Charles Fensky, the father of the intervenor, Charles F. Fensky, relying on and believing the said inventories and the said representations, accepted the sum of \$1,000.00 then paid to him by the said Campbell and signed and delivered to the said Campbell for the said Jeanette Fensky a similar transfer, release and quitclaim, releasing and conveying to the said Jeanette Fensky all of the right, title and interest of the said Charles Fensky in and to the property, assets and estate of the said Ferdinand Fensky, deceased; that the sum of \$1,000.00 so paid to each of the complainants and to the said Charles Fensky, as their respective full shares of the said estate, and for which they signed the said releases and quitclaim deeds, is all that either of the complainants or the said Charles Fensky ever received from the said estate of the said Ferdinand Fensky, deceased; that the said sums were so paid to the said complainants and to the said Charles Fensky by the said Campbell out of funds



in his hands collected from the assets of the said estate; that the said Jeanette Fensky did not advance or pay anything whatsoever for the said releases and quitclaims, or for any of them; that the sum of \$1,000.00 received by each of the complainants and by the said Charles Fensky was only a part of the money then due to them, respectively, from the said estate of the said Ferdinand Fensky, deceased, and that the said Jeanette Fensky parted with nothing of value for the said releases and quitclaims; that the said instruments executed by the said complainants and by the said Charles Fensky were, and are, and each of them was and is ineffective, without consideration and wholly fraudulent and void, for that the same were secured from the complainants and from the said Charles Fensky, and from each of them, upon the faith of the aforesaid false, fraudulent and misleading misrepresentations, statements, and representations made by the said Jeanette Fensky and by the said Campbell; that if the complainants and the said Charles Fensky had known or had any suspicion of the truth, no one of them would have executed the said or any releases and quitclaims, but would have insisted upon receiving their several respective full shares of the said estate.

43. In not decreeing that prior to March 30th, 1905, M. T. Campbell remitted to Jeanette Fensky about \$20,000.00 in cash and secured notes, being the proceeds of the assets of the estate of Ferdinand Fensky, deceased, which came into the hands of the said

Campbell; that on or about March 30th, 1905, the said Jeanette Fensky filed in the Superior Court of the state of California, in and for the county of Los Angeles, a final account in the estate of the said Ferdinand Fensky, deceased, in which she represented that she had secured the interests of all of the brothers and sisters and other heirs at law of the said Ferdinand Fensky, deceased, and that she was the only one entitled to the said estate; that no part of the said amount was included in her said account; that there then being no debts due from the said Ferdinand Fensky, deceased, and there being no opposition to the said final account, the same was received and approved by the said Superior Court and an order was entered discharging the said Jeanette Fensky as administratrix of the said estate and closing the said estate; that the said Jeanette Fensky thereupon caused to be filed for record in Los Angeles county and in Orange county, California, the releases and quitclaim deeds that had been executed by the complainants and by Charles Fensky, the father of the intervenor, Charles F. Fensky, and by the other heirs at law of the said Ferdinand Fensky, deceased; that upon the faith of the same the said Jeanette Fensky secured purchasers of the property in Orange county, California, and also of some of the property in San Pedro, California; that with the money and mortgages received from the said Campbell in the circumstances herein set forth, and with the money derived from the sale of the said real estate in California, the said Jeanette Fensky pur-

chased real estate in Los Angeles county, California, and at the time of her death in 1908 she was the owner of the following described real estate, to-wit:

Item 1. The north 66 feet of the east 200 feet of lot 80, L. H. Michner's subdivision of the north 38 acres in block U of Painter & Ball's Addition to Pasadena, California.

Item 2. Lot 6 in block A, New Fair Oaks Avenue Tract, Pasadena, California.

Item 3. Lot 12 of A. F. Mill's subdivision of the north half of lot 6 of the Berry & Elliott Tract, Pasadena, California.

Item 4. That portion of lot "O" of the San Pasqual Tract, in Pasadena, California, described as follows: Beginning at a point in the east line of lot four, distant one hundred thirty-two feet south from the northeast corner thereof; thence west parallel with the north line of said lot two hundred feet to the east line of Magnolia avenue one hundred feet; thence east parallel with the north line of said lot two hundred feet to the east line thereof; thence along the last mentioned line one hundred feet to the place of beginning.

Item 5. Lot 2 of the F. E. Crawford Tract, in Pasadena, California.

Item 6. Lot 16 of S. H. Doolittle's subdivision of lot 21 of B. F. Ball's subdivision, in Pasadena, California.

Item 7. Lot 10, Peck's subdivision of block 74, in San Pedro, California.

Item 8. A piece of property in New High street, in the city of Los Angeles, county of Los Angeles, state of California, described as follows: Commencing at a point on the west line of New High street, distant 200 feet southwest from the southwest corner of Alpine street and New High street; thence southwesterly along the west line of New High street 73 feet to a point; thence westerly and at right angles to said west line of said New High street 64 feet to a point; thence northeasterly and at right angles to said last mentioned course and distance and parallel with the west line of New High street 73 feet to a point; thence easterly by a straight line 65 feet to the west line of New High street to point of beginning; being parts of lots 10 and 11, in block 33 of Ord's Survey, according to the map in book 53, page 68, miscellaneous records of Los Angeles county, California.

Item 9. The portion of lot 21 of A. F. Mill's subdivision of the north half of lot 6 of the Berry & Elliott Tract, in Pasadena, California, beginning at the northwest corner of said lot; thence east along the south side of Colorado street 25 feet; thence south one hundred thirty-two and seventy-five hundredths feet to an alley; thence west 25 feet; thence north one hundred and thirty-two and seventy-five hundredths feet to the place of beginning, except a strip twelve and seventy-five hundredths feet wide off the north side, now a part of Colorado street.



Item 10. The south fifty feet of the north one hundred feet of lot eight, and the south fifty feet of the north one hundred feet of the west ten feet of lot seven of L. A. Michner's subdivision of lots fourteen to seventeen, both inclusive, of the Summit Avenue Tract, in Pasadena, California.

Item 11. Lot 24 of Mary H. Newton Tract, in Pasadena, California.

Item 12. Lot 7 in block A of G. Weingarth's subdivision B of the San Gabriel Orange Association Lands in Pasadena, California.

44. In not decreeing that prior to the death of the said Ferdinand Fensky, the said Jeanette Fensky had no money or property whatsoever, and that all of the property, including the real estate in Pasadena, California, owned by her at the time of her death was acquired by the use of money and assets belonging to the estate of the said Ferdinand Fensky, deceased, and which was owned by the said Ferdinand Fensky in his lifetime in his own right and as his separate property.

45. In not decreeing that the said Jeanette Fensky died on July 8th, 1908; that prior to her death and on or about September 18th, 1907, the said Jeanette Fensky, without any consideration therefor, signed a deed purporting to convey to the defendant, Amanda Katzung, certain real property on New High street in the city of Los Angeles, California, and described as follows:

A piece of property in New High street, in the city of Los Angeles, county of Los Angeles, state of Cali-



fornia, described as follows: Commencing at a point on the west line of New High street, distant 200 feet southwest from the southwest corner of Alpine street and New High street; thence southwesterly along the west line of New High street 73 feet to a point; thence westerly and at right angles to said west line of said New High street 64 feet to a point; thence northeasterly and at right angles to said last mentioned course and distance and parallel with the west line of New High street 73 feet to a point; thence easterly by a straight line 65 feet to the west line of New High street to point of beginning; being parts of lots 10 and 11, in block 33 of Ord's Survey, according to the map in book 53, page 68, miscellaneous records of Los Angeles county, California; that on or about September 8th, 1907, the said Jeanette Fensky, without any consideration therefor, signed a deed purporting to convey to the said Amanda Katzung lot 10 in Peck's subdivision of block 74, San Pedro, California; that at or about the same time, the said Jeanette Fensky, without any consideration therefor, signed a deed purporting to convey to the defendant, Eugene Wellke, real estate situated in the state of Kansas; that with funds received from M. T. Campbell, which were the proceeds of the estate of Ferdinand Fensky, deceased, in the state of Kansas, and with funds arising from the sale of the real property in Orange county, acquired by the said Jeanette Fensky from the said estate of Ferdinand Fensky, deceased, the said Jeanette Fensky, on or about May 28th, 1907, purchased the north

60 feet of the east 200 feet of lot 8 in Michner's subdivision of the northeast 38.86 acres in block U of Painter & Ball's Addition to Pasadena, California, and thereafter signed a deed purporting to convey to the defendant Alma J. Schmidt the said last mentioned property.

46. In not decreeing that on or about August 14th, 1908, on the petition of the defendants Eugene Wellke, Amanda Katzung and Alma J. Schmidt, the defendant J. H. Merriam was appointed by the Superior Court of the state of California, in and for the county of Los Angeles, administrator of the estate of Jeanette Fensky, deceased; that in the said petition it is alleged that the whole of the property of the said Jeanette Fensky at the time of her death consisted of about \$2,300.00 in money; that for some time after his appointment as administrator of the said estate, the said J. H. Merriam took no steps whatsoever looking to the administration of the said estate, but on September 8th, 1909, he filed in the said estate an inventory from which it appears that the total assets of the said estate of the said Jeanette Fensky, deceased, amounted to \$3,509.38, consisting of \$2,324.38 in cash, a claim against Mrs. Katzung for \$135.00 and a note of the defendant Don Ferguson for \$1,050.00; that upon the filing of the said inventory and upon September 8th, 1909, the defendant J. H. Merriam filed his final account of the said estate and in the said final account represented that the property of the said Jeanette Fensky in the course of administration in the Probate

Court of Shawnee county, Kansas, had been wholly administered and distributed; and further represented that the said Jeanette Fensky left as her sole heirs at law the defendants Eugene Wellke, Amanda Katzung and Alma J. Schmidt.

47. In not decreeing that at the time the defendant J. H. Merriam filed his final account in the estate of Jeanette Fensky, deceased, he knew that the said Jeanette Fensky at the time of her death owned the real estate hereinafter described and knew that the same was distributable among the brothers and sisters of Ferdinand Fensky, the deceased husband of the said Jeanette Fensky, and the descendants of deceased brothers and sisters of the said Ferdinand Fensky, by right of representation, and knew that neither the said Eugene Wellke nor the said Amanda Katzung nor the said Alma J. Schmidt had any interest whatsoever in the said real property or in any thereof, the said real property being described as follows:

Item 1. The north 66 feet of the east 200 feet of lot 80, L. H. Michner's subdivision of the north 38 acres in block U of Painter & Ball's Addition to Pasadena, California.

Item 2. Lot 6 in block A, New Fair Oaks Avenue Tract, Pasadena, California.

Item 3. Lot 12 of A. F. Mill's subdivision of the north half of lot 6 of the Berry & Elliott Tract, Pasadena, California.

Item 4. That portion of lot "O" of the San Pasqual Tract in Pasadena, California, described as follows:

Beginning at a point in the east line of lot four, distant one hundred thirty-two feet south from the northeast corner thereof; thence west parallel with the north line of said lot two hundred feet to the east line of Magnolia avenue one hundred feet; thence east parallel with the north line of said lot two hundred feet to the east line thereof; thence along the last mentioned line one hundred feet to the place of beginning.

Item 5. Lot 2 of the F. E. Crawford Tract, in Pasadena, California.

Item 6. Lot 16 of S. H. Doolittle's subdivision of lot 21 of B. F. Ball's subdivision of Pasadena, California.

Item 7. Lot 10, Peck's subdivision of block 74, in San Pedro, California.

Item 8. A piece of property in New High street, in the city of Los Angeles, county of Los Angeles, state of California, described as follows: Commencing at a point on the west line of New High street, distant 200 feet southwest from the southwest corner of Alpine street and New High street; thence southwesterly along the west line of New High street 73 feet to a point; thence westerly and at right angles to said west line of said New High street 64 feet to a point; thence northeasterly and at right angles to said last mentioned course and distance and parallel with the west line of New High street 73 feet to a point; thence easterly by a straight line 65 feet to a point; thence easterly by a straight line 65 feet to the west line of New High street to point of beginning; being



parts of lots 10 and 11, in block 33 of Ord's Survey, according to the map in book 53, page 68, miscellaneous records of Los Angeles county, California.

Item 9. The portion of lot 21 of A. F. Mill's subdivision of the north half of lot 6 of the Berry & Elliott Tract, in Pasadena, California, beginning at the northwest corner of said lot; thence east along the south side of Colorado street 25 feet; thence south one hundred thirty-two and seventy-five hundredths feet to an alley; thence west 25 feet; thence north one hundred and thirty-two and seventy-five hundredths feet to the place of beginning, except a strip twelve and seventy-five hundredths feet wide off the north side, now a part of Colorado street.

Item 10. The south fifty feet of the north one hundred feet of lot eight, and the south fifty feet of the north one hundred feet of the west ten feet of lot seven of L. A. Michner's subdivision of lots fourteen to seventeen, both inclusive, of the Summit Avenue Tract, in Pasadena, California.

Item 11. Lot 24 of Mary H. Newton Tract, in Pasadena, California.

Item 12. Lot 7 in block A of G. Weingarth's subdivision B of the San Gabriel Orange Association lands in Pasadena, California;  
that the said Merriam well knew and it was, and is, a fact that some time prior to her death, about September 18, 1907, the said Jeanette Fensky made out and signed deeds purporting to convey the said property owned by her as follows:



A deed to Alma J. Schmidt of the real estate described herein as item 1 of the real estate owned by Jeanette Fensky at the time of her death;

A deed to Eugene Wellke of the real estate described in item 2;

A deed to Minnie S. Farnsworth of the real estate described in item 3;

A deed to the defendant Eugene Wellke of the real estate described in item 4;

A deed to the defendant Amanda Katzung of the property described in item 5;

A deed to the defendant Alma J. Schmidt of the real estate described in item 6;

A deed to the defendant Amanda Katzung of the real estate described in item 7;

A deed to the defendant Amanda Katzung of the property described in item 8;

A deed to the defendant Eugene Wellke of the real estate described in item 9;

A deed to the defendant Corrine Loveland of the property described in item 10;

A deed to the defendant Eugene Wellke of the property described in item 11;

A deed to the defendant Eugene Wellke of the property described in item 12;

that none of the deeds so made out and signed by the said Jeanette Fensky were delivered to the respective grantees named therein until after the death of the said Jeanette Fensky; that the title and ownership of the said property did not pass to the said grantees or

to any of them; that at the time of her death the said Jeanette Fensky was the owner of all of the said real property; that the defendant J. H. Merriam well knew all of the facts herein set forth and, knowing the same, wholly omitted the said property and all of the same from his inventory and accounts in the estate of the said Jeanette Fensky, deceased, and pretended to make distribution of the estate of the said Jeanette Fensky and paid over to each of the defendants, Eugene Wellke, Amanda Katzung and Alma J. Schmidt, the sum of \$235.61 out of the assets of the said estate, and also turned over to them certain notes and other property belonging to the said Jeanette Fensky.

48. In not decreeing that the defendant J. H. Merriam, while acting as administrator of the estate of Jeanette Fensky, deceased, was employed by and acted as attorney and agent for the defendants Eugene Wellke, Amanda Katzung, Minnie S. Farnsworth and Alma J. Schmidt, and that at the same time the said defendant, Merriam, had full knowledge of the rights of the complainants and of the intervenor herein in and to the estate of Jeanette Fensky, deceased, and of the other brothers and sisters of Ferdinand Fensky, deceased, and the descendants of deceased brothers and sisters of the said Ferdinand Fensky, and that the said defendant, Merriam, purposed and designed to prevent the complainants and the intervenor and the other heirs at law from securing their just shares of the said estate of the said Ferdinand Fensky, deceased, and of the said Jeanette Fensky, deceased.

49. In not decreeing that the defendant J. H. Merriam, although acting as administrator of the estate of Jeanette Fensky, deceased, and although requested so to do, made and has made no effort to represent the said estate or to have the administration thereof continued by the Superior Court of the state of California, in and for the county of Los Angeles, and has failed, refused and neglected further to administer the said estate and that he denies the rights of the complainants and of the intervenor herein and of the other heirs at law in respect thereof.

50. In not decreeing that all of the estate of Ferdinand Fensky, deceased, was his separate property, and as such upon the death of his widow, Jeanette Fensky, the said estate and its avails descended ratably to the surviving brothers and sisters of the said Ferdinand Fensky and not to the sisters and brother of the said Jeanette Fensky.

51. In not decreeing that the complainants herein have not received from the estate of their deceased brother, Ferdinand Fensky, anything except the sum of \$1,000.00 each, paid to them by M. T. Campbell, and that Charles Fensky, the father of the intervenor, Charles F. Fensky, did not receive from the estate of the said Ferdinand Fensky, deceased, anything except the sum of \$1,000.00, paid to him by the said M. T. Campbell, and that the said intervenor has not received anything whatsoever from the said estate of Ferdinand Fensky, deceased.

52. In not decreeing that the defendant Minnie S. Farnsworth is a daughter of the defendant Eugene Wellke, and claims to be the owner of lot 12 of A. F. Mills subdivision of the north half of lot 6 of the Berry and Elliott Tract, Pasadena, California, by virtue of a certain deed signed by the said Jeanette Fensky in her lifetime but which was not delivered prior to her death, and that whatever right, title or interest the said defendant had or has, or claimed or claims to have, in the said property is subject to the claims of the complainants and the intervenor herein as heirs at law of Ferdinand Fensky, deceased, and of Jeanette Fensky, deceased.

53. In not decreeing that until about July or August, 1912, neither of the complainants nor the intervenor herein, nor Charles Fensky, the father of the said intervenor, had any notice or knowledge or suspicion of the truth respecting the amount, extent and value of the estate of Ferdinand Fensky, deceased, or of the frauds or fraudulent conduct of and fraudulent misstatements concerning the same made by M. T. Campbell and Jeanette Fensky and J. H. Merriam.

54. In not decreeing that until about July or August, 1912, neither of the complainants nor the intervenor nor Charles Fensky, the father of the said intervenor, had any notice or knowledge or suspicion of the truth respecting the undelivered deeds made by Jeanette Fensky in her lifetime to the defendants Wellke, Farnsworth, Katzung and Schmidt, or any notice or knowledge or suspicion of the fact that the deeds



signed by the said Jeanette Fensky on or about the 18th day of September, 1907, were made without consideration, or that the same were not delivered to the respective grantees named therein prior to the death of the said Jeanette Fensky.

55. In not decreeing that during the month of July, 1912, one of the daughters of the complainant, Louisa Pickens, while visiting in Los Angeles, California, accidentally secured access to the correspondence between M. T. Campbell and the said Jeanette Fensky, which disclosed a part of the truth relative to the estate of Ferdinand Fensky, deceased, and the dealings of the said Campbell and of the said Jeanette Fensky in reference thereto.

56. In not decreeing that the deeds signed by Jeanette Fensky on or about September 18, 1907, were recorded a few days after her death, but were made and acknowledged several months before she died, and that until early in the year 1913, neither of the complainants nor the intervenor nor Charles Fensky, the father of the said intervenor, had any notice or knowledge that the said deeds were not delivered to the respective grantees during the lifetime of Jeanette Fensky.

57. In not decreeing that during the pendency of the proceedings in the Probate Court of Shawnee county, Kansas, and during the pendency of the proceedings in the Superior Court of the state of California, in and for the county of Los Angeles, involving the administration of the estate of Ferdinand

Fensky, deceased, and the administration of the estate of Jeanette Fensky, deceased, none of the records or papers filed in either of the said estates disclosed the truth concerning the extent and value of the estate of Ferdinand Fensky, deceased, or the facts relating to the estate of Jeanette Fensky, deceased, that were secured by the discovery by the complainants of the correspondence between M. T. Campbell and the said Jeanette Fensky, and since the said discovery, and that the said facts aroused the suspicions of the complainants and caused them to use, and prior to the filing of the bill of complaint herein they did use, extraordinary efforts to learn the facts concerning the estate of the said Ferdinand Fensky, deceased, and concerning the estate of Jeanette Fensky, deceased, and the extent and value of each of the said estates.

58. In not decreeing that each of the complainants, and Charles Fensky, the father of the intervenor herein, believed the statements contained in the inventories filed in the respective estates of Ferdinand Fensky, deceased, and Jeanette Fensky, deceased, in the Probate Court of Shawnee county, Kansas, and in the Superior Court of the state of California, in and for the county of Los Angeles, and believed the representations made to them by Jeanette Fensky and M. T. Campbell and by the defendant Merriam, and that except for such representations, the said complainants and the said Charles Fensky would not have released the estate of Ferdinand Fensky from their just claims and would not have made any assignment or quitclaim

of any interest therein, but that the said complainants and the said Charles Fensky would have enforced their respective claims against the said estate of Ferdinand Fensky, deceased, and against the estate of Jeanette Fensky, deceased.

59. In not decreeing that subsequently to the recording of the deeds signed by Jeanette Fensky on or about the 18th day of September, 1907, to the defendants herein, the defendant Eugene Wellke conveyed to persons other than the defendants in this action the real property described as follows:

Lot 6 in block A, New Fair Oaks Avenue Tract, Pasadena, California;

That portion of lot "O" of the San Pasqual Tract in Pasadena, California, described as follows: Beginning at a point in the east line of lot four, distant one hundred thirty-two feet south from the northeast corner thereof; thence west parallel with the north line of said lot two hundred feet to the east line of Magnolia avenue one hundred feet; thence east parallel with the north line of said lot two hundred feet to the east line thereof; thence along the last mentioned line one hundred feet to the place of beginning;

The portion of lot 21 of A. F. Mill's subdivision of the north half of lot 6 of the Berry & Elliott Tract, in Pasadena, California, beginning at the northwest corner of said lot; thence east along the south side of Colorado street 25 feet; thence south one hundred thirty-two and seventy-five hundredths feet to an alley; thence west 25 feet; thence north one hundred

and thirty-two and seventy-five hundredths feet to the place of beginning, except a strip twelve and seventy-five hundredths feet wide off the north side, now a part of Colorado street;

Lot 24 of Mary H. Newton Tract, in Pasadena, California,

and with the proceeds thereof purchased property known as No. 146 South Pasadena avenue, and further described as lot 60 of Baker's subdivision, and also purchased property known as No. 726 Manzanito avenue, in the city of Pasadena, and that the said Eugene Wellke is still the owner of the said two pieces of real property last mentioned.

60. In not decreeing that with the money derived by Jeanette Fensky from the estate of Ferdinand Fensky, deceased, she purchased, and at the time of her death was the owner of the following described real estate in the county of San Bernardino, California, to-wit: The east half of the farm lot 181 of subdivision of lands belonging to Semi-Tropic Land and Water Company, as per map recorded in book 6 of maps, page 12, records of San Bernardino county; that on or about September 18th, 1907, the said Jeanette Fensky, without any consideration therefor, signed a deed purporting to convey to the defendant Alma J. Schmidt the aforesaid real property; that the said deed was made without any consideration whatsoever and that the same was not delivered to the grantee therein named prior to the death of the said Jeanette Fensky; that the said Jeanette Fensky was the owner of the



said real property at the time of her death and that the same was distributable among the heirs at law of Ferdinand Fensky; that the said facts were well known to the defendant J. H. Merriam at the time he filed his inventory in the estate of Jeanette Fensky, deceased, and that the said Merriam omitted the said property from his inventory and accounts as administrator of the said estate of the said Jeanette Fensky, deceased.

61. In decreeing that the controversy involved in this action depended upon the question whether or not M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, was actuated by a fraudulent purpose and intent when he conducted the probate proceedings in the said estate in Kansas and made his returns as administrator thereof.

62. In decreeing that in all that Campbell had to do in the matter of purchasing the respective interests of the heirs at law of Ferdinand Fensky, deceased, the said Campbell was acting as the agent of Jeanette Fensky and was entitled to deal at arm's length with the said heirs at law whose interests he was seeking to purchase for the said Jeanette Fensky.

63. In not decreeing that M. T. Campbell, while acting as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, had no right or authority to act as the personal agent or representative of any one of the heirs of the said decedent, adversely to, or as against the interest of any other heir of the said decedent.

64. In decreeing that when M. T. Campbell dealt in his fiduciary capacity, he was at all times, or at any time, actuated by honest and *bona fide* motives.

65. In decreeing that the contracts for the sale of real estate entered into by Ferdinand Fensky in his lifetime did not serve to operate as an equitable conversion of the titles to the respective properties so contracted to be conveyed, and that the said contracts did not serve, in any way, to convey the legal or equitable title to the real property therein described.

66. In decreeing that any decision of the Supreme Court of Kansas having reference to the equitable conversion of real property into personal property by the execution of a contract of sale of real estate was controlling and binding upon the Federal Court.

67. In decreeing that the Kansas Supreme Court has ruled, by consistent ruling, or otherwise, that where real property is sold under contract of sale, and notes for the purchase price are not given, and where time, either expressly or impliedly, is made of the essence of the contract, and where the right is given to the vendor, upon a default on the part of the vendee, immediately to declare a forfeiture and retake possession of the property agreed to be conveyed, there is no conveyance or equitable conversion of the legal title.

68. In decreeing that by the decrees of the Probate Courts in Kansas and in California and in the proceedings had in the estate of Ferdinand Fensky, deceased, in the said states, the widow, Jeanette Fensky, became

possessed of the right to the enjoyment of the estate of the said Ferdinand Fensky, in any manner other than as provided by the laws of the said respective states.

69. In decreeing that Jeanette Fensky, at any time, or for any reason, became or was entitled, equitably, or otherwise, to any interest in the estate of Ferdinand Fensky, deceased, or to any interest in any property owned by the said Ferdinand Fensky at the time of his death except as provided by law.

70. In not decreeing that M. T. Campbell, while acting as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, was the trustee of all the heirs at law of the said Ferdinand Fensky, deceased, and was acting in a fiduciary capacity.

71. In not decreeing that Jeanette Fensky, while acting as administratrix of the estate of Ferdinand Fensky, deceased, in California, was the trustee of all the heirs at law of the said Ferdinand Fensky, deceased, and was acting in a fiduciary capacity.

72. In not decreeing that the defendant J. H. Merriam, while acting as administrator of the estate of Jeanette Fensky, deceased, in California, was the trustee of all the heirs at law of the said Jeanette Fensky, deceased, and was acting in a fiduciary capacity as to all persons having any interest in or claim upon or against the property of the said Jeanette Fensky or of Ferdinand Fensky, the deceased husband of the said Jeanette Fensky.

73. In not decreeing that the defendant J. H. Merriam should be held to account, as administrator of the estate of Jeanette Fensky, deceased, for the property of the said estate which came into his hands or to his knowledge for which no account has been rendered.

74. In decreeing that the settlement of the account of M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, was conclusive as to the complainants and the intervenor as to property omitted or withheld from the account, either fraudulently or accidentally.

75. In decreeing that the settlement of the account of Jeanette Fensky, as administratrix of the estate of Ferdinand Fensky, deceased, in California, was conclusive as to the complainants and the intervenor as to property omitted or withheld from the account, either fraudulently or accidentally.

76. In decreeing that the settlement of the account of J. H. Merriam, as administrator of the estate of Jeanette Fensky, deceased, in California, was conclusive as to the complainants and the intervenor as to property omitted or withheld from the account, either fraudulently or accidentally.

77. In not decreeing that the releases and quitclaims executed by the complainants and by Charles Fensky, the father of the intervenor, were fraudulent and void and of no effect, and that the same did not estop the said complainants or the said Charles Fensky



or the said intervenor from claiming their respective shares of the estate of Ferdinand Fensky, deceased.

78. In decreeing that the complainants and the intervenor are bound or concluded by the decrees of distribution in the estate of Ferdinand Fensky, deceased, or by either of them.

79. In decreeing that the complainants and the intervenor are bound or concluded by the decrees of distribution in the estate of Jeanette Fensky, deceased, or by either of them.

80. In decreeing that the decree of distribution in the estate of Jeanette Fensky, deceased, was or is valid.

81. In decreeing that due and legal notice was given of the hearing of the petition for distribution in the estate of Jeanette Fensky, deceased.

82. In decreeing that due and legal notice was given of the hearing of the supplemental petition for distribution in the estate of Jeanette Fensky, deceased.

83. In admitting in evidence the judgment roll in the case entitled Pickens v. Campbell, in the District Court of Shawnee county, Kansas.

84. In decreeing that the complainants are bound or concluded in this action by the judgment rendered and entered in the case entitled Pickens v. Campbell, in the District Court of Shawnee county, Kansas.

85. In decreeing that the Federal Court is bound or concluded by the decision of the Supreme Court of Kansas in the case entitled Pickens v. Campbell.

86. In decreeing that the complainants are bound or concluded in this action by the decision of the Supreme Court of Kansas in the case entitled *Pickens v. Campbell*.

87. In ordering a decree dismissing the bill of complaint.

88. In entering the final decree of dismissal April 15, 1920.

I.

**The Decision on the Former Appeal (242 Fed. 363)  
is the Law of the Case.**

This is the second appeal to this court in this action. The former appeal was from the order and decree of the District Court dismissing the bill.

*Pickens v. Merriam*, 242 Fed. 363.

This court in the former appeal decided certain of the questions involved in the cause, and to that extent the principles of law which shall govern the case have been determined.

*Ex parte Sibbald v. U. S.*, 37 U. S. (12 Pet.) 488, 491, 9 L. Ed. 1167;

*Washington Bridge Co. v. Stewart*, 44 U. S. (3 How.) 413, 424, 11 L. Ed. 658;

*National Bank of Commerce v. U. S.*, 224 Fed. 679, 140 C. C. A. 219;

*Coal & Iron Ry. Co. v. Reherd*, 226 Fed. 441, 141 C. C. A. 271.

On the former appeal (242 Fed. 363) this court held:

(1) That a change of condition in the property or in the relations of the parties thereto will not be presumed; that prejudice will not be presumed from the lapse of time; that a marked increase in the value of property will not be presumed; that these are matters of defense and must be established by proof upon the trial.

(2) That where by reason of the conduct of the appellees in this action, or of their predecessors, in concealing the facts concerning the estate, there was in fact no adversary trial or decision upon the issues involved in the cause, this action was not barred by the decree of the Probate Court settling the final account of the administrator.

(3) That the decree of the Probate Court settling the account of the administrator is not conclusive as to property accidentally or fraudulently withheld from the account.

(4) That if property be omitted from the administrator's account by mistake and be subsequently discovered, a court of equity may exercise its jurisdiction and take such action as justice to the heirs of the decedent may require, and this is so even though the Probate Court might open its decree and administer upon the omitted property.

(5) That a fraudulent concealment or disposition of property is always a ground for the interposition of equity.

(6) That the bill of complaint stated a cause of action, including a cause of action against the defendant, Merriam, for an accounting for the property of the estate of Jeanette Fensky.

The effect of the formed decision was to determine that if the allegations contained in the bill of complaint were established by the complainants, they were entitled to a decree as prayed.

In subsequent portions of this brief it will be shown that the allegations contained in the bill of complaint have been conclusively proven by uncontradicted evidence, and that the evidence fully sustains the contention of the appellants upon the points discussed by this court upon the former appeal, as well as upon others which were not raised upon that appeal.

## II.

### **On an Appeal in an Equity Case the Appellate Court will Consider and Review both the Law and the Facts.**

This court is not bound by the decree of the District Court. The case being one in equity, this court will decide the same upon its merits.

Ridings v. Johnson, 128 U. S. 212;

Johnson v. Harmon, 94 U. S. 371, 378.

On an appeal in an equity case the facts, as well as the law, are open to the Appellate Court for consideration, and the issues, both of law and of fact, must be disposed of upon the record.

Alexander v. Redmond, 180 Fed. 92.



Where a case is before the Appellate Court, not upon exceptions to the master's findings, but upon appeal from the judgment of the court below, after a hearing on the merits, the Appellate Court is in no wise hampered by the master's findings and conclusions, but the whole case is before the court for determination.

Ridings v. Johnson, 128 U. S. 212, 218, 32 L. Ed. 401;

Elliott v. Toeppner, 187 U. S. 327, 334, 47 L. Ed. 200;

Mt. Vernon Refrigerating Co. v. Wolf Co., 188 Fed. 168, 110 C. C. A. 200.

An appeal in a suit in equity in the federal courts invokes a trial of the case *de novo*, and it is the duty of the Appellate Court to decide the issues as presented by the evidence in the record.

Alexander v. Redmond, 180 Fed. 92;

Anderson v. Hultberg, 247 Fed. 273, 279;

Waterloo Mining Co. v. Doe, 82 Fed. 45, 27 C. C. A. 50;

Beach Mod. Eq. Prac., Sec. 978.

On appeal in an equity case the facts, as well as the law, are open for consideration. The finding of the trial court, while entitled to high consideration, will be reversed if the same is against the weight of the evidence.

Bush v. Branson, 248 Fed. 377, 160 C. C. A. 387.

It follows from the foregoing citations that this court will examine fully and carefully the evidence for the purpose of determining the soundness and correctness of the decision of the court below upon the facts as well as the law, and will, by appropriate orders, direct the entry of such a decree herein as is justified by the record.

**The Quit Claims from Complainants to Jeanette Fensky of their Interest in the Estate of Ferdinand Fensky, were Obtained by Concealment of Property and Wilful Misrepresentations made by Jeanette Fensky, the Administratrix and Campbell.**

Ferdinand Fensky died intestate in the county of Los Angeles, state of California, on August 7th, 1903 [Tr. p. 292], leaving surviving him as heirs-at-law the complainants Louisa Pickens and Johanna Schutt, sisters of the said intestate, and besides the complainants he left other heirs-at-law as follows: Jeanette Fensky, his widow (since deceased); Frederick Fensky, a brother; Ida Wendt, a sister (since deceased); Hulda Richter, a sister; Augusta Krauss, a sister; Charles Fensky, a brother (since deceased), the father of the intervenor Charles F. Fensky; and George Fensky, a son of a brother who died during the lifetime of said intestate; the said Ida Wendt died intestate subsequent to the death of Ferdinand Fensky, leaving a son, Conrad Wendt, and some years prior to the bringing of this suit, the said Conrad Wendt died unmarried,

intestate and without issue or direct heirs, and each of the complainants succeed to one-seventh of the interest of the said Ida Wendt in the estate of the said Ferdinand Fensky. [Tr. pp. 638, 266-267, 320.] Ferdinand Fensky never had any children. [Tr. pp. 598, 291.]

In October, 1903, Jeanette Fensky was appointed by the Superior Court of the county of Los Angeles, state of California, administratrix of the estate of Ferdinand Fensky [Tr. p. 631], and one M. T. Campbell, the agent and representative of the said Jeanette Fensky, was, on October 26th, 1903, appointed administrator of the estate of the said Ferdinand Fensky by the Probate Court at Shawnee county, Kansas. [Tr. pp. 292-293.]

In the circumstances hereinafter detailed, and as a result of fraudulent statements and concealments by the administrators, the appellants, and the other heirs-at-law of Ferdinand Fensky, by means of quitclaim deeds, conveyed to Jeanette Fensky, the California administratrix, their respective interests in the estate of Ferdinand Fensky. [Tr. pp. 581-585.]

By way of introduction on this subject:

*An Administrator Is a Trustee For the Heirs.*

Since this proposition, which we deem fundamental, appears to have been disregarded by the administrators and rejected by the trial court, we quote a few authorities as follows:

“An executor or administrator is, in equity, a trustee for the next in kin, legatees and creditors.” (Michoud v. Giroud, 45 U. S. 503, 557.)

“Representative Capacity. The executor or administrator is not only the personal representative of the decedent, but is also to a very great extent the representative of the creditors, and of the heirs or legatees.” (18 Cyc. 206.)

“She (the administratrix) could claim only in a representative capacity, first, in the right of the intestate, and, second, as trustee for creditors and distributees.” (Carroll v. U. S., 80 U. S. 151, 153.)

“Executors and administrators also come under the general designation of parties holding fiduciary relations to others, and legatees may of course rely upon representations made by the administrators in regard to the estate.” (Bigelow on Fraud, p. 517.)

“Letters of administration are a trust.” (Forsyth v. Woods, U. S. (11 Wall. 484, 487.)

“An administrator sustains to the estate, the heirs and other persons interested the relation of trustee.”

Magraw v. McGlynn, 26 Cal. 421;

2 Schouler on Wills, Exrs. & Admrs., Sec. 1242.

Jeanette Fensky was administratrix of the estate of Ferdinand Fensky in California, and as such she became a trustee for the heirs and could not lawfully acquire their interests in his estate by any dealings at arm's length.



Full Disclosure and Utmost Good Faith and Adequate Consideration Are Absolutely Required to Be Affirmatively Shown by One Holding a Fiduciary Relation as Trustee, in Order to Sustain a Transaction by Him Whereby He Has Secured Property to Himself From His Cestui Que Trust.

If not so shown, affirmatively, the transaction must be considered conclusively fraudulent and void at the suit of the *cestui que trust* seeking relief from the transaction.

The general rule applicable to the transaction in securing the releases from the appellants of their interest in the estate of Ferdinand Fensky is stated as follows:

“Where a relation of trust and confidence exists between the parties it is the duty of the party in whom the confidence is reposed to make *full disclosure of all material facts within his knowledge relating to the transaction in question, and any concealment of material facts by him is fraud.*” (12 Rul. Cas. Law 311.)

“Nothing is more elementary than the *right* of the *cestui que trust* to *know*, and the corresponding *duty* of the trustee to *disclose* what has been done in the execution of the trust.” (Valentine v. Harbeck, 6 N. Y. Supp. 572.)

“The most comprehensive class of cases in which equitable relief is sought on the ground of concealment is in the case of transactions between persons standing in a fiduciary relation to each

other. In all such cases the party who fills the position of active confidence is under an equitable obligation to disclose to the party towards whom he stands in such relation every material fact which he himself knows calculated to influence his conduct on entering into the transaction. The suppression of any material fact renders the transaction impeachable in equity." (Kerr on Fraud and Mistake, p. 105.)

It sometimes occurs, as in the case at bar, that a trustee seeks to obtain an advantage over the *cestui que trust* by constituting, as here, another trustee her agent, thereby securing the benefit of that trustee's influence over the person with whom he sustains confidential relations. And their acts of concealment constituted legal fraud. Of the general relief which will be granted in cases of fraud it is said:

"Courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done." (Story's Eq. Jur., Sec. 187.)

The same principle is emphatically decided with reference to persons holding fiduciary relations where concealment was practiced, in the very recent case decided in this month of January, 1921, in the case of *Steiglitz v. Settle*, 33 Cal. App. Dec. 110; *Cox v. Delmas*, 99 Cal. 123; *Felton v. Breton*, 92 Cal. 469.

In the case of *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571, the opinion therein is so exhaustive and full of sound reasoning upon this subject, that we reprint herewith an excerpt from that case. The facts in this case which evoked this decision are very similar to those in the case at bar, and for that reason we earnestly invite the court's perusal of that decision. In part the court says:

"No rule is better established than that, if a trustee, or person standing in the relations of trust and confidence to another, deal with the *cestui que* trust, or such other, in respect to the subject of such trust, for his own benefit, or that of others whom he represents, serving two persons at the same time in form, when in contemplation of law he can serve but one loyally, the transaction cannot be upheld if called in question by the *cestui que* trust, unless the trustee is able to prove to the satisfaction of the court, by clear and satisfactory evidence, that the two were at arm's length in the transaction, that no confidence was reposed in him by the beneficiary, that the bargain was profitable to the beneficiary, and that he was fully informed in regard to the value of the property and the nature of his interest in it." (Citing *Mills v. Mills*, 63 Fed. 511, and other cases.)

Continuing, the court says:

"The burden of proof in such a case rests upon the trustee to clearly free himself from the imputation of fraud arising from the facts." Quoting from 2 Pomeroy Eq. Jur., Sec. 598, as follows: "The trustee must show by unimpeachable and

convincing evidence that the beneficiary, being *sui juris*, had full information and complete understanding of all the facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the *price was fair and adequate*, and that he made to the beneficiary a *perfectly honest and complete disclosure* of all the knowledge and information concerning the property possessed by himself, or which he might with reasonable diligence have possessed."

Continuing, the court says:

"From the fact that the transaction in question was pecuniarily injurious to the appellant, and the circumstance of the existence of either of the relations mentioned, a presumption of fraud arises which must prevail, even if only the first relation mentioned existed, in the absence of evidence showing affirmatively that appellant dealt with a full understanding and appreciation of her rights, and must prevail at her election in *any event, since the relation of trustee and cestui que trust existed.*"

"Intentional concealment is legal fraud." (Bean v. Macomber, 33 Mich. 127.)

"It is the duty of trustees in transactions with their *cestui que trust*, such as gifts, sales, contracts, or the like, to see that the latter are properly advised in regard to their rights; and the burden of proof rests upon the trustee to show such fact and the perfect fairness, openness and reasonableness of the transaction." (1 Bigelow on Fraud, 138.)



A trustee cannot purchase the interests of the others unless he makes a full and fair disclosure of all the facts, and enables them to deal with him on terms of perfect equality.

(Cook v. Sherman, 20. Fed. 167.)

Section 2235 of the Civil Code reads:

“All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are *presumed* to be entered into by the latter without sufficient consideration, and under undue influence.”

The honorable trial court from which this appeal was taken has unfortunately, notwithstanding the above settled principles, in its decision distinctly declared, that a trustee is not bound by those principles, but that on the contrary, he may, lawfully (as was done in this case), deal at arm's length with his *cestui que trust* [Tr. p. 195], and in doing so also conceal from them the property of his trust and all knowledge thereof, and in addition thereto wilfully misrepresent to them the true condition of the estate, for the purpose of obtaining for the *benefit of the trustee* their interests in the estate, and even without consideration, except by use of funds belonging to the estate to which complainants were justly entitled.

In *Wingerter v. Wingerter*, 71 Cal. 105, it is held that where dealings are had between parties standing in



fiduciary relations, "not only is the utmost good faith upon the part of the fiduciary required, but the burden of proof devolves upon him to show that such faith was observed, and also that the beneficiary was fully informed of his rights, and not misled even by unintentional misrepresentations."

Equity will look with careful scrutiny upon all transactions between trustee and beneficiary, and if it appears that the trustee has taken any advantage of the beneficiary the transaction will not be upheld.

Adams v. Cowen, 177 U. S. 471, 484, 44 L. Ed. 851, 856;

Taylor v. Taylor, 49 U. S. (8 How.) 183, 12 L. Ed. 1040;

Ludington v. Patton, 111 Wis. 208, 86 N. W. 571;

Latham v. Barney, 14 Fed. 433, 441;

Michoud v. Giroud, 45 U. S. (4 How.) 503, 11 L. Ed. 1076;

Griffith v. Godey, 113 U. S. 89, 28 L. Ed. 934;

Golson v. Dunlap, 73 Cal. 157.

Wheeler v. Smith, 50 U. S. (9 How.) 55, 13 L. Ed. 44.

To the same effect:

*In re Biel*, L. R. 16 Eq. 577;

Luff v. Lord, 34 Beav. 220;

Reeder v. Meredith, 78 Ark. 111, 115 Am. St. Rep. 22;

Beard v. Campbell, 2 A. K. Marsh. 125, 12 Am. Dec. 362.

In 1 Perry on Trusts, Sec. 195:

“The trustee is in such a position of confidence and influence over the *cestui que trust*, that the contract or bargain will either be void or he will be a constructive trustee, at the election of the *cestui que trust*, unless the trustee can show that the contract was entirely fair and advantageous to the *cestui que trust*. The presumption is against the transaction. \* \* \* the question is not whether or not there is fraud in fact, the law stamps the purchase by the trustee as fraudulent *per se*.”

In 1 Bigelow on Fraud, pp. 261, 262, the author says:

“When a party, complaining of a particular transaction, such as a gift, sale or contract, has shown to the court the existence of a fiduciary or a confidential relation between himself and the defendant, and that the defendant occupied the position of trust or confidence therein, *the law raises a suspicion* or, it is often said, *a presumption of fraud*; a suspicion or presumption, *arising as matter of law, that the transaction brought to the notice of the court was effected through fraud*, or, what comes to much the same thing, undue influence by the opposite party, by reason of his occupying a position affording him peculiar opportunities for taking advantage of the complaining party. Having special facilities for committing fraud upon the party whose interests have been intrusted to him, the law, looking to the frailty of human nature, *requires the party in the superior situation to show that his action has been honest and honorable*.”

In *Rubidoex v. Parks*, 48 Cal. 215, 219, it is said:

“The question, in all such cases, does not turn upon the point whether there is any intention to cheat or not, but upon the *obligation, from the fiduciary relation of the parties, to make a frank and full disclosure.* (1 Story’s Eq., Sec. 316a.)

In such cases, ‘the law presumes the existence of that superiority and influence on the one part, and that confidence and dependence on the other, which is the natural result of the relation, and will accordingly decree the cancellation of the contract, unless it appear affirmatively to have been equal and just.’”

In the case at bar, no attempt was made to show any such affirmative matter, and accordingly there has arisen, of course, the conclusive presumption of fraudulent procurement and consequently it entitles complainants to the relief that it is void. Moreover, the complainants not even resting upon that conclusive fraudulent presumption, have, in addition to it, proven a case against the trustee of designedly, fraudulent concealment of property and wilful misrepresentations as to facts respecting it, which cannot be adequately phrased short of unqualified intentional deception and fraud committed by this trustee in the premises.

**Jeanette Fensky, the California Administratrix of  
the Estate of Ferdinand Fensky, Committed  
a Fraud Upon the Appellants.**

Fraud is accomplished by means of secrecy, circumvention and concealment as well as by spoken words.

None of these means of attaining the desired end were omitted by Jeanette Fensky in dealing with the appellants and the other heirs.

It has been said that fraud is a generic term. It embraces all of the multifarious means devised by human ingenuity that are resorted to by one person to obtain advantage over another.

Let us see the failure in this case to observe the *simplest principles* laid down for the guidance of those acting in a *fiduciary capacity*.

In *Burch v. Smith*, 15 Texas, 219, the court said:

“Wherever there is a special relation of confidence between the parties, the *duty* to communicate all facts of interest to the party whose situation prevents him from possessing full knowledge of the facts necessary to intelligent action is imperative. *Any concealment in such a case will be fatal.*”

We contend that whenever a relation of trust or confidence exists between the parties, as between *trustee* and *cestui que trust*, or between one occupying any other position of special trust and confidence and the one relying upon such relations, where the *duty of full and complete disclosure exists*, any *act of concealment* by the one upon which such *duty rests*, *tending to influence the conduct of the other*, constitutes a *breach of trust* and brands the *whole transaction as an actual fraud*.

It is said in Perry on Trusts, section 178:

“It is not enough that they do not affirmatively misrepresent. *They must not conceal.* They must speak and speak fully to every material fact known to them, or the contract will not be allowed to stand.” (Cases cited in note 4.)

It was so held in:

Brooks v. Martin, 69 V. S. (2 Wall) 70, 84.

In Pomeroy's Eq. Jur. (4th Ed.), Sec. 873, it is said:

“Fraud in equity includes all wilful or intentional acts, omissions and concealments, which involve a breach of either legal or equitable duty, trust, or confidence, and are injurious to another.”

It was the purpose of Jeanette Fensky, the administratrix, to conceal from Mr. Fensky's heirs as much of the estate as possible, and to obtain their respective interests in the estate without adequate consideration. A part of the fraud in this connection is shown by letters that were written while the probate proceedings were pending. The letters are many and are of considerable length, and we respectfully invite the attention of the court to the full letter, although we have adverted to and quote herein from some of the more pertinent portions thereof.

Ferdinand Fensky died in Los Angeles county, California, where he was domiciled, on the 7th day of August, 1903 [Tr. p. 292], leaving an estate in California and in Kansas [Tr. pp. 293-309, 506, 507, 320-327, 261, 604, 605, 455, 524-529, 252, 258] of value of about \$80,000.00, exclusive of interest. See



also Campbell's accounts [Tr. pp. 461-502] showing large sums of money sent to Jeanette Fensky after the death of Ferdinand Fensky, and unaccounted for in his estate.

Within five years subsequent to the death of Ferdinand Fensky in 1903, there had been collected from properties and assets in Kansas, belonging to him as his separate estate, at the time of his death more than \$85,000.00. This was the proceeds of the evidences of indebtedness due F. Fensky at the time of his death and sent there for collection by the administratrix and returned to her prior to her death in July, 1908, in the form of cash, secured notes and mortgages. [Tr. pp. 461-502, 445, 308, 262.]

Jeanette Fensky was appointed administratrix of the estate of Ferdinand Fensky [Tr. p. 631] and upon his death she came into the possession of monies, promissory notes, mortgages and all evidences of indebtedness due to the said Ferdinand Fensky [Tr. pp. 329, 334, 252, 258] and in pursuance of the scheme to defraud the complainants and the other heirs at law of Ferdinand Fensky entered into a fraudulent and collusive agreement, with one M. T. Campbell, that he should act as her agent and representative in obtaining releases from them without adequate consideration. And in furtherance of said agreement procured the said Campbell to be and he was appointed as so-called administrator in Kansas.

Mr. Goodrich, Jeanette Fensky's attorney in California, wrote to Campbell under date of September

4th, 1903, stating that Jeanette Fensky had requested him to write him and that "Mrs. Fensky has employed me to act as her attorney in the settlement of the estate, and, having a great deal of confidence in you, she wishes you to act as the administrator of the estate, to settle up and probate the property which is in the state of Kansas. An administrator has to be appointed here also. Now Mrs. Fensky wishes to have *you act for her* in adjusting all matters pertaining to the estate in Kansas." [Tr. p. 328.] Mr. Goodrich also told Campbell that Mr. Fensky's next of kin were brothers and sisters and the children of deceased brothers and sisters, "the names of these you can get from his relatives there at Topeka." [Tr. p. 329.] also that "Mrs. Fensky will send on all of the papers which pertain to any and all property in Kansas." [Tr. p. 329.]

It will be noted that upon a full reading of the above letter of Goodrich's [Tr. pp. 328-329] he said, "Now Mrs. Fensky wishes to have you *act for her* in adjusting *all matters pertaining to the estate* in Kansas," and *also* wished him to "act as administrator" of the estate in Kansas. This letter also contained the observation that because "the laws in Kansas are more liberal with the widow than the laws of California," she wished to have all his property located in Kansas distributed "under the laws of your state." [Tr. p. 328.]

Immediately upon receipt of the foregoing, on Sept. 8, Campbell wrote *accepting* the *employment* and ex-

pressing deep regret that Mrs. Fensky could not hold the entire estate and saying that "of course all his real estate here will go to her," but that he supposed "all his personal property" would "descend under the law of California." He also made mention of the many *mortgages* and *land contracts* belonging to Fensky.

In the same letter he said:

"Give me your views of Mrs. Fensky's relation to the land and lot contracts for deeds. If she is now the sole owner of the lands and I think (without investigating the question) that she is, ought she not either to make *new contracts in her own name or give deed and take back mortgages for balance of purchase money?*"

In the same letter of September 8th, Campbell said:

"Is it at all probable that the brothers and sisters will make any claim to the contracts for deeds for property here? As soon as I am appointed administrator, I will be besieged and I want to know *your* views on some of these *important questions* before expressing *my* opinion. *I am quite willing to act for Mrs. Fensky* and will try to treat her fairly in my charges." [Tr. pp. 330-332.]

On Sept. 9th a petition for his appointment, sworn to by J. W. McClure, an entire stranger to the Fensky estate, was filed in the Probate Court. This petition stated that Jeanette Fensky, a resident of California, was the *only heir* of Ferdinand Fensky, deceased. [Tr. p. 291.] No mention was made of his next of kin, referred to in Goodrich's letter of a few days before,

and he later boasted to the *California administratrix* of what he had done. [Tr. pp. 339, 375, 411.]

On Sept. 14th, 1903, Goodrich writing on behalf of Jeanette Fensky said:

"I am glad to learn that you will *act for Mrs. Fensky* in the settlement of her late husband's estate, \* \* \* Mrs. Fensky *of course* wishes you to act as *her agent there, as well as to be administrator.*"

He then proceeds in this same letter to set out plans, and makes suggestions whereby Jeanette Fensky might claim all of the purchase money due on the land contracts, particularly if the contracts are *not recorded*, he suggests (having been advised that the *real estate* would descend to Mrs. Fensky) that if they are "*not recorded, prima facie*, under the law so far as the *record* is concerned she would be the real owner of the lands." He also suggests that "it may be that the deeds which were placed in escrow in the bank" will sufficiently cover the case, and turns the matter over to Campbell to manage for her. He also stated that he had advised Mrs. Fensky to get releases from the brothers and sisters. Of this he says:

"In relation to the brothers and sisters making any claim to the contracts for deeds, Mrs. F. says that she cannot tell what they will do. But so far as the personal property is concerned and also the land here I have advised her to compromise with them and get their receipts in full for what interest they may have in the estate. If you have any suggestions to make along the line of such a compromise, please do so,



and assist us in bringing the same about.” [Tr. pp. 332-335.]

To this Campbell replied on Sept. 18th, saying:

“I think your idea of having Mrs. Fensky buy out the other heirs is a good one. \* \* \* I could *negotiate* all right with these here, Mrs. Krauss, Mrs. Pickens and the nephew George. *They are all good friends of mine and will believe what I tell them*, I think. [Tr. pp. 339, 340.]

He also remarked in this same letter:

“It seems to me now the *wise* thing for her to do is either to make *new* contracts for deeds in *her own name* or as I suggested in my last, \* \* \* give *purchaser a deed and take back a mortgage for balance due.*” [Tr. p. 337.]

In this same letter is the following:

“Going back to the land and lot contracts: I am satisfied that none of them are recorded. The parties who hold duplicates are all in *possession* of the property they contracted for and there was and is no need for them to record the contract to protect *their rights*. *The public records therefore show F. Fensky to be the owner in fee of all the property*, and a deed from his sole heir would convey a good title. \* \* \* I ought to have all the lot and land contracts, which as I have said before, ‘*we*’ will treat as Mrs. Fensky’s *sole property*, so that I may be in a position to deal with the other parties promptly. *I am confident none of them will put their contracts on record if I advise them not to.*” [Tr. pp. 340, 341.]



Goodrich answered Campbell on Sept. 24, 1903, in part, as follows:

"Yours of the 18th inst. is at hand. And in reply I will say that I fully agree with you in all of the matters, that you have investigated and decided upon; but in relation to the distribution of the personal property there seems to be some question arising that I wish you would investigate so far as your laws and decisions of your courts go; *our law here and the decisions of our courts* upon this matter is that all of the personal estate of the deceased, must be inventoried in the county where the deceased lived at the time of his death.

"Now the question comes up if we are compelled to place all of his personal property upon the inventory here, *would not the Probate Court here have the distribution of the personal property*, the same to be distributed under the laws of this state. Of course we cannot differ in our opinions in relation to which of the state laws the personal must be distributed under. We both say that it must be distributed under the laws of the state (I wish it was otherwise), where the party lived and died. Now the question is, can the Probate Court in your county distribute personal property under the laws of California, if not then all of the personal property, when converted into money or its equivalent will have to be sent to the administrator here so that the same can be distributed here.

"Now Mr. Campbell please look this matter up and if you find that your court there has full jurisdiction over the personal property of the estate of the deceased, let me know this fact and then it will not be proper for us to inventory the personal here. \* \* \*

"I will send you the papers as fast as Mrs. F. can get them ready. \* \* \* She says that she wants you as *administrator* to go to the bank and get what money there is paid in upon the contracts and send to her and she will receipt for the same, she says that she needs some money, and I do not suppose that the bank would send it to her, as it would not be proper for them or *her* to do any business of that kind outside of yourself as the agent for her or as the *administrator* of the estate. \* \* \* I will enclose you under separate cover the *contracts for deeds*. \* \* \* And you can also take up the deeds which are in escrow in the bank and you can make out new deeds and send them here for Mrs. F. to sign and acknowledge, \* \* \* and in some cases where enough has not been paid on the contract to justify the taking back of a mortgage, send on a new contract for her to sign.

"You say that on the death of Mr. F. that the *lands* belonging to him at the time of his death *vested* in Mrs. F. under Kansas laws without reference to any probate proceedings; while this is true so far as the law is concerned; yet would she not have to probate the estate in order that she might have a record title to these lands, in other words, would not the court have to assign the real estate to her \* \* \* in order that the same might go upon the records and supply the link in the chain of title, upon the records.

"We will get the notes and mortgages together and send them to you as soon as possible. \* \* \*

"Mrs. Fensky just came into my office and says, tell Mr. Campbell that I want he should hurry up as fast as he can as she wants to close the estate as soon

as she can, she brought in the contracts for sale of real estate and there are 29 of them. They are so heavy that I guess I will send them by express.” [Tr. pp. 341-345.]

Campbell replied Sept. 28, 1903:

“When I said that Mrs. Fensky could do as she pleased with the real estate here regardless of probate proceedings I did not mean that we would not go on through the Probate Court, but only that she was perfectly safe in making a deed to any property here as sole owner thereof (if any one would accept it) because we all know that Ferd left no debts that such property could ever be liable for. \* \* \*

“I will follow instructions about money in the bank and report soon. I have no doubt they will pay it over to me on my receipt for same. I sent Mrs. Fensky a check for \$100 lately on the strength of what Mrs. Coughlin told me. I will send such a receipt as I think she should sign and if it meets your approval have her sign it and return it. I hope she will take no steps in any of her business matters without consulting you.

“Time enough for *me* to have the names of the ‘heirs at law’ after it is determined whether or not the Stoker money must be distributed here or whether I may send it to the California administrator to be distributed.

“You say you will send the notes and mortgages soon but I hope not before you have made an inventory of them. \* \* \* I hope she will not get impatient at the ‘law’s delay.’ This matter cannot be *‘rushed’ with safety to her interests* and I fear there are many disappointments in store for her before the

'estate is closed,' \* \* \* and will do the best *I can* to have the business move on to a *successful termination*.

"It is barely possible that the Stoker money being a part of the Kansas estate at the time of Fensky's death, may be distributed according with the Kansas laws, instead of the California laws. I must investigate this further before '*we*' definitely *determine* what course to pursue in regard to it." [Tr. pp. 349-350.]

The "money in the bank" referred to in the foregoing letter and in Campbell's subsequent letter was never accounted for in any manner in the estate of Ferdinand Fensky. [Tr. pp. 293-309, 524-529.]

Campbell being fully advised that Ferdinand Fensky had signed deeds to the holders of contracts and that the same had not been delivered before his death, wrote to Goodrich, Mrs. Fensky's attorney, in reference to the *money in the bank* and the deeds, on Oct. 6th, 1903, as follows:

"I went to the Citizens State Bank yesterday and got statement of account with Fensky, which herewith send you, and which shows a balance due Fensky of \$942.82. \* \* \* I hope also that Mrs. Fensky will keep the money on the land contracts intact, *till 'we' see whether or not the heirs are going to make any claim that those contracts are "PERSONAL" estate*. I am going to *use the deeds made by Ferdinand and wife as far as possible, in order, the more effectually to eliminate that personal property question*. The *record* will look all right and will 'tell nothing' about the *time* the deed was delivered. I want to take mortgages back to Mrs. Fensky in all cases where the property



is good security for balance due. \* \* \* *I know I have had the confidence of Krauss and his sister Mrs. Pickens for many years.* \* \* \*” [Tr. p. 356.]

Campbell wrote in his diary October 28th, 1903:

“Wrote a postal to J. V. B. Goodrich, telling him I was *treating the Simms’ note as belonging to Mrs. Fensky*, \* \* \* that the add’n. people were *not taking their deeds as readily* as I would desire.” [Tr. p. 455.]

Another entry in his diary is in reference to the Stein notes of \$2400, owing to Ferdinand Fensky at the time of his death, and, which reads as follows:

“Rec’d contracts for deeds from Goodrich, Mrs. Fensky’s attorney. Wrote Mrs. Fensky asking her if the Stein notes did not belong to her and cautioning her to call her lawyer’s attention to all cases where notes had been turned over to her so that they would not be treated as part of her late husband’s estate.” [Tr. p. 454.]

The written memorandum referred to in the above diary entry appears in the record in the form of a postal card to Mrs. Fensky and contains this significant language:

“Did not Ferd give you the Stein notes before he died? If so, they do not belong to the estate and should not be inventoried as part of the estate. Any notes turned over to you, whether he indorsed them or not are your separate individual property, and you must be sure and call Judge Goodrich’s attention to all such cases so that he will not put them in as a part of the estate. *See?*” [Tr. p. 351.]



Mrs. Fensky did "see" the point quite readily. She wrote a letter to Mr. and Mrs. Stein asking them to substitute a new note payable to her, dated *prior* to her husband's death, bearing a decreased rate of interest and to keep the transaction to themselves. [Tr. pp. 261-265.] It is interesting to follow the "Stein notes" through their history of concealment, from the date of Ferdinand Fensky's death and on down through the years into the hands of Jeanette Fensky's administrator, appellee Merriam, and the same was *disposed* of by him without accounting for it in any manner in the estate of his decedent, Jeanette Fensky. And in this connection it seems an opportune time to mention that defendant Farnsworth was at all times cognizant of the fraud and frauds that were perpetrated by Jeanette Fensky upon these appellants and their co-heirs. It appears that she wrote the letters for Mrs. Fensky that passed between her and the Stein's and Campbell and others. [Tr. pp. 585.] We shall hereinafter show the fraud in connection with the concealment of assets other than the contracts.

Throughout the proceedings Campbell was constantly beset with the fear that the heirs of Mr. Fensky and the Probate Court would discover the *existence* of the contracts, knowing that in that event he could not hope to convince them that their interest in the estate was but \$1000 each. On November 12th, 1903, he wrote to Mrs. Fensky:

"None of Ferd's brothers or sisters have said a word to me yet about the estate, and I am a little sur-

prised that Mrs. Pickens does not say anything to me about it. Are you making any effort to buy them out? If so, *keep me posted* so that we may not in any way *interfere with each other in any efforts in that direction.*

"The only thing that I am at all afraid of there being any trouble over is the addition contracts. I am a little afraid that the heirs may claim them as *personal property*, although I have not had a hint of anything of the kind as yet from any source, and I don't believe that the court would so hold if the question was raised, but I would feel safer if the *addition people would take the deeds that you and Fred* made and which, of course, when recorded, would appear as if the title passed all right while Fred was still living, but they don't seem to care about doing so and of course I cannot urge it. \* \* \* However, I will do the best I can and hope there will never be any *claim made by the heirs* for that part of the property." [Tr. pp. 363-364.]

On November 20th, Mrs. Fensky the administratrix, wrote to Campbell in response to his of the 12th:

"Now regarding the addition contracts & deeds. Give me your idea as to whether it would be best for me (or my attorney) to write direct to those persons holding contracts and ask them to take deeds." [Tr. pp. 364-365.]

On November 23rd, 1903, Campbell made this entry in his diary:

"Received letter from Mrs. Fensky and wrote her card before I left my office. On the way home had a talk with Mrs. Pickens about the Fensky estate & after I came home wrote *Mrs. Fensky again a long*

*letter, & set out in full my reasons for having the addition people take their deeds."*

In the letter to Mrs. Fensky referred to in his diary, and which makes particular mention of his representations to appellant Louisa Pickens, and in which Campbell again expressed his fear that the contracts would become public, and sets out his plan to perpetrate a fraud upon the purchasers under these contracts in giving them *void deeds*, in order to *conceal the contracts from the heirs*. He wrote:

"I wrote you a card just before I left my office this evening and a minute after I put it in the box on my way home I met Mrs. Pickens, the first time I have seen her for two or three months. \* \* \* I told her you had nothing else on the S. side and then *explained* to her that it would be a *good while* before all the notes and mortgages could be *collected*, and that maybe some of them *never* could be *all collected*, that in any event it would be a *good while* before any one could compel distribution without giving a good bond, etc., and that if she could get hers now in property it would perhaps be *better* for her than to wait. She wanted to know about how much there would be to distribute. I told her I had not figured the matter closely but that if *all* the notes and mortgages were collected I thot' there would be about \$20,000, and that 1/2 of it would go to you and the other 1/2 to the other heirs—in short that each of the *heirs would get about \$1000*. Yesterday I told Krauss about the same thing. *If we could only agree on the amount each ought to have then the wise thing to do would be to buy them out.*

*"I am afraid if you write to the Add-people about the deeds that it will arouse suspicion that something is wrong. And should any of them go to a lawyer and ask him about those deeds he would tell them that a deed signed but not delivered nor to be delivered until after the death of the grantor was no deed at all, and that would scare half of them out of their wits. And yet I know that if they take these deeds no question will ever be raised as there will be nothing of record to show when they were delivered and they would show that they were signed (altho not made because the delivery is a part of the making of a deed) before F's death. I would rather they would take these deeds now than a deed from you alone, simply because that property is not as likely to attract the attention of the 'heirs' if it looks like it was sold before F died instead of after he died. I don't know that any of them will ever claim that the Addn-contracts are a part of the personal estate and subject to the California law, but it is too early yet to tell what they will claim. And if they do make such a claim, I think we can defeat them, but I want, if possible, to save the trouble and expense even of defeating them. I reason therefore that all the lots that will show on record as sold before F's death are just that much further away from the probability of attack; because no one would be foolish enough to claim that the 'heirs' had any right to a note and mortgage made to you on property that was sold by Fred himself. With this idea in view and for the sole purpose of more thoroughly protecting you against possible claims of the "heirs" I have picked out about a dozen of the Add-people from whom I think it would be safe for you to take a mortgage, and I have suggested to most of them that if they wanted their deed now I would*



advise you to give it and take a mortgage for the balance. \* \* \*

"I feel sure that Mr. Goodrich will agree with my view of this matter as the best way to keep the Add contracts out of any possible controversy, but it will require some tact to get the folks to take the deeds and give back the mortgages, \* \* \* I am afraid a letter from you or Mr. Goodrich to them in regard to the deeds will arouse a discussion that might embarrass us. So let me *casually* call their attention to their own interest in the matter when they come to make their payments and in that way it will not appear as if we were too anxious. \* \* \* *I am afraid the scheme to buy out the heirs will not work.* \* \* \*

"But suppose the opportunity offers for me to talk about it to those here, how much shall I offer? \* \* \* Is there any property out there that you have to divide with the 'heirs'? I only care to know so that I can speak advisedly in case any of them talk to me about the *amount* they ought to have." [Tr. pp. 366-370.]

It will be remembered that the above letter was received by the California *administratrix* and her *stamp of approval* put upon the *concealments*. Campbell later writes to her in answer to a letter from her, which is not in the record, in which he uses this significant language: "*I see you 'catch on' to the point in giving deeds to parties holding contracts.*" [Tr. p. 384.] It will also be observed that in this letter above Campbell says, "I told her (Louisa Pickens) that each of the heirs would get about \$1000," and then he says, "If *we* could only agree on the *amount each ought* to have then the *wise* thing to do would be

to *buy them out*.” He had previously been commissioned by Jeanette Fensky to buy out the other heirs, and had advised her (the administratrix) that he had the full confidence of the heirs and that they would believe whatever he told them [Tr. p. 340] and the suggestion that, “if *we* can agree upon the *amount each ought* to have,” that *through him she* could convince the *cestui que trusts* that *that amount* was their full share of the estate. In the subsequent letters it is declared that she has made money by the purchase of the interests of the heirs, *exclusive* of the property concealed.

The foregoing letter brought forth the following from Goodrich, November 28th, 1903:

“Mrs. Fensky called on me, and is quite anxious to obtain from the heirs-at-law quit-claims or receipts in full for their interest in her late husband’s estate.

\* \* \* And in order that you may talk with the heirs who are located at Topeka, I send you herewith a statement of the inventory which has been filed here.

\* \* \*” [Tr. p. 370.]

He then sets forth in this letter a total of \$3,700.00, which is subject to distribution. As *one* example of the *misrepresentations* as contained in this inventory, we call the court’s attention to the *60 acres of sand and sage* land, valued at \$1400.00. John Davis testified that he had been *farming* this land for five years prior to the time of Ferdinand Fensky’s death, and had purchased from him on contract, shortly before his death, *thirty acres*, of this *sixty acres*, making a payment

at that time, and was owing \$1650.00 to Fensky at the time of his death on account of this purchase, which sum was subsequently paid to his administratrix and is unaccounted for in his estate. [Tr. p. 603.]

In this same letter Goodrich continuing, says:

“Now you know what the property is there, and, of course, the heirs cannot expect any of that property there which could, *in the least way, be recognized as real estate.* And if any of the *personal* property belonging to his estate, which is in your hands, is to be distributed under the laws of the state of California, then out of such personal property would come all of your expenses and expenses of the distribution of the estate, and then the widow has one-half of the balance of said personal property, *if any*, it seems to me that but little would remain to distribute among the heirs. *So you may talk to them on that line and see what can be done with each of them.*” \* \* \* [Tr. pp. 370-372.]

Campbell later wrote to Mrs. Fensky in reference to the above letter as follows:

“Oscar Krauss (the husband of one of the heirs) called this morning and I showed him copy of my inventory filed in court, and read him *such portions* of Judge Goodrich’s letter in regard to your inventory there as *I thought proper* and he made a minute of the amounts, which aggregate something over \$24,000 and is to give me his idea of my proposition to pay each \$1000 soon.” [Tr. p. 397.] Continuing Campbell said that if they would accept that sum, she would “*make money by it as an investment.*” [Tr. p. 398.]

On Jan. 8th, 1904, Campbell wrote in reference to the Simms note belonging to the estate, that he was treating it as her *individual* property and not the estate. [Tr. p. 374.]

Campbell wrote to Mrs. Fensky Jan. 11th, 1904, boasting that he had successfully concealed from the court the identity of the other heirs, other than herself, and cautioning against a distribution until the "*addition matters*" were in better shape. Meaning, of course, the changing of the contracts belonging to F. Fensky, into mortgages to her individually. [Tr. p. 375.]

March 30, 1904, Campbell again wrote to Mrs. Fensky concerning the holders of contracts:

"I am so anxious to have all of them that have paid enough to get their deeds *before the 'probate court'* takes any action to distribute the estate that I think it best to take a little risk in the matter of security for balance due on the lot." [Tr. p. 376.]

On a torn calendar leaf he also wrote to Mrs. Fensky:

"Some of the addition people are a little slow but I am gradually getting matters in that 'neck of the woods' in the shape I want them. Have 8 mortgages now. \* \* \* I want as many to take deeds as I think it safe to take a mortgage from before *any further steps are taken in the 'Probate Court,'* but it will not do to allow them to think I am in a *hurry* about it." [Tr. p. 287.]

April 6th, 1904, the administratrix, writing to Campbell, requested information concerning the contract



holders, and the names of those that had accepted deeds, etc.

Under date of April 11, 1904, Campbell wrote that he had given deeds *to* and had taken mortgages *from* a number of the contract holders [Tr. p. 379] and on April 28, 1904, he wrote that "more of them are getting in the notion of taking deeds and when I get that phase of the business closed up, I will begin to think about taking steps to close up the estate." [Tr. p. 381.]

On May 26, 1904, Campbell wrote:

"I sent for Geo. Fensky and had another talk with him today about his interest in the estate and *explained to him that the share of each heir would probably be about \$1000.* \* \* \*

"Do you have any communication with any of the heirs? *I told Krauss once that I thought each heir would get about \$1000.* \* \* \*

"If you think it worth while to try to buy out the heirs, it ought to be done before I take any steps toward a distribution *through the court.* *I would like also to get some more of the addition people to take their deeds before any developments in court.* I don't fear any contest unless some of the heirs get the fool notion in their heads that the lot and land contracts are *personal* property and subject to division." [Tr. pp. 382-384.]

Mrs. Fensky apparently answered this letter, although her letter is not in the record, and on June 22, 1904, Campbell wrote as follows:

"I see you '*catch on*' to the '*point in giving deeds to parties holding contracts*, but strange to say there

are about half dozen who are so afraid of the word mortgage that they will not take their deed and I can't talk too much about it *for fear of arousing suspicion and perhaps inquiry of some 'fool lawyer.'*

\* \* \* No Mrs. Rost is not paying *rent*. She has a contract for deed just like the rest." [Tr. pp. 384-386.]

On June 23, 1904, Campbell wrote in his diary:

"Had a talk this evening with Oscar Krauss in regard to the Fensky estate, and arranged for him to examine inventory of property about the middle of next month with a view of his advising the brothers and sisters of the deceased to sell their interest in the estate to Mrs. Fensky, the widow." [Tr. p. 455.]

On July 5, 1904, Campbell wrote relative to the Goff contract:

"Perhaps it would be well for you to make a new contract with him—and also with Pruessner. \* \* \* Talk to Judge Goodrich about this & see if he does not think it would *answer about the same purpose, from the standpoint of the 'heirs,' as the giving of a deed & taking mtg.*" [Tr. p. 390.]

And in the same letter said:

"And after I settle with George think I will at least make an effort to buy out the others. *If we can't buy them out, will take steps to have the court make distribution, as by that time I will have deeds in the hands of most of the addition people & I think these same notes & mortgages that you would just as soon take as money on your share.*

"In regard to Mrs. Rost, if we were '*dead sure*' that no question would ever be raised by the '*heirs*' about

*these land contracts, I would say let the contract continue, but in view of the possibility of such a question being raised, and the fact that the property is worth \$1500 to \$2000 more than they owe you I believe I would risk taking a mortgage for am't due & giving her a deed. \* \* \** I asked Laura if she thought it worth while for me to see her father in regard to buying his interest in the estate on a basis of about \$1000 and she said she was afraid not, as he had an idea that there was much more coming to him than that." [Tr. p. 388.]

"Am glad Judge Goodrich prepared the quitclaim deed for George to sign. When I prepared my assignment I was thinking only of the personal property—which is the only kind of property belonging to the estate *in Kansas*, but in view of his interest in the real estate in California, the quitclaim deed is better." [Tr. pp. 390-391.]

On July 6, 1904, Campbell wrote to the appellant, Johanna Schutt, and accompanied the letter with a copy of the inventory appearing on [Tr. pp. 269-272.] It omits all reference to the Stein note of \$2400, and the notes of Simms and Kimmerle, the monies in the banks, the contracts for the sale of real estate in California and Kansas, the real value of the California real estate and certain other items, aggregating in amount, more than \$40,000. The letter is as follows:

"Under the law of California where Ferd Fensky died intestate, one-half of his real and personal property in that state goes to his widow and the other half to his brothers and sisters. The same rule applies to his personal property in this state and I have been

appointed administrator of his estate and have three years from the date of appointment in which to close up the estate. The personal property here consists of notes and mortgages and on their face amount in the aggregate, including money collected, to about \$21,000. A number of the debtors want time in which to pay & if Mrs. Fensky, the widow, was to take over these notes, she could accommodate these people and still collect nearly all the money on the notes in exchange of them. If collection is forced, there will necessarily be much expense and loss attending collection. I can't be at all sure how much each of the heirs, besides the widow, will be likely to realize out of the whole estate after all expenses and losses are paid but I think somewhere in the neighborhood of \$1000 and I have advised Mrs. Fensky *that if she can buy out the other heirs for \$1000 or less to do so*. If you think favorably of the suggestion and will accept \$1000, in full of your share of the estate let me know soon and I will prepare an assignment of your interest to Mrs. Fensky and see that you get the money without unnecessary delay. I have such an agreement with one of the heirs here (George Fensky, a nephew) and expect to settle with the others on a like basis. I believe such a settlement would be *fair* to Mrs. Fensky and under all the other *circumstances better for the other heirs*, as it would save time and much court costs." [Tr. pp. 393, 394.]

At the same time he wrote similar letters to other heirs. [Tr. pp. 398, 392-395.]

In the above letter and the letters written to the other heirs we find the proposition that if the heirs will *sell* that Mrs. Fensky will *buy*. But the purchase



was made with the estate funds. [Tr. p. 407.] We also find the suggestion of "*losses*" and much expense which he and Jeanette Fensky knew was not true, and not at all likely to occur, as is evidenced by his letter to the California administratrix, from which we quote as follows:

"All the notes can be collected except the little Stump note. The F—— note may have to be partly traded out, but all the rest *are as good as cash.*" [Tr. p. 403.]

He later writes that, "*Even the Stump note can be collected.*" [Tr. p. 441.]

On July 14, 1904 Campbell wrote to Jeanette Fensky, the administratrix:

"Rec'd the George deed yesterday and will close the deal with him soon.

"When I wrote Richter, I also wrote in substance the same offer to the others. \* \* \*

"This morning stopped to see Krauss and he said Charles had referred the matter to him and that he would come to my office next Saturday and talk the matter over with the view of writing Chas. and telling him the facts as he may learn them from me. I intend to show him my inventory and Judge Goodrich's statement of the California property and I feel pretty sure from the way Krauss talks that he will advise the sale to you of each share for \$1,000. If they are willing to accept that I want to be sure that it is satisfactory to you before I pay out any money. I will use the form of release and quitclaim Judge Goodrich prepared in George's case and soon close the deal after it is

agreed to. So be sure to write me soon that it is all right to pay the \$1000.00 to those who see fit to accept.

Will put the Wellke deed on record today. \* \* \*"  
[Tr. p. 396.]

Mr. Krauss testified that in these conferences *Campbell never mentioned "contracts" and that he, himself, knew nothing of the contracts until this litigation.* [Tr. p. 275.] He further testified that he did not know at the time he advised his wife to accept \$1000 that W. C. Stein owed the estate \$2400, and which did not appear in the property statement given to him by Campbell purporting to show the full value of the estate, and did not know of the other notes and monies in the banks, which were omitted from the inventories, and had no notice or knowledge of the true value of the estate, other than as was listed in that statement. He also testified that he did not know that Campbell was acting as agent and attorney for Mrs. Fensky, and that Campbell indicated in these negotiations that if the heirs would accept \$1000 each and assign their interest that it would cut the matter short instead of keeping it in the Probate Court for years, and the expenses of the court, and so forth, and that the amounts set out in the statement "*if collectable*" would be all that the heirs would share in [Tr. p. 268] and that it would expedite the matter if we accepted the \$1000, as it was only a matter of time that we gained by it. [Tr. pp. 273, 266-273.]

On July 6, 1904 the following was written to the California administratrix by Campbell:

“Oscar Krauss called this morning and I showed him copy of my inventory filed in court and read him such portions of Judge Goodrich’s letter in regard to *your inventory there as I thought proper* and he made a minute of the amounts which aggregate something over \$24,000, and is to give me his idea of my proposition to pay each \$1000. I showed him what I had written to the heirs and handed him my letter to Mrs. Wendt for him to send when he wrote her. I feel pretty confident that he will recommend a settlement on that basis. And from your standpoint I am sure it will *be much better for you*. You will not only *make money* by it as an *investment*, but it will avoid the possibility of any contests in Probate Court. I am only afraid some of them will not accept the offer. If they accept, the main inducement will be the early payment rather than to wait two more years as I have indicated they might have to. Krauss talked like he thought Frederick would be the hardest to settle with. But I wrote him also and guess I will hear something from him before long. Let me know what you and Judge Goodrich think of the proposition as soon as possible.”  
[Tr. p. 397, 398.]

It appears from the following hurried note written by Campbell to the administratrix that one of the heirs (probably Frederick) had written that he would not assign his interest in the estate. He wrote:

“Just now got this. Return it some time.

“I am a little disappointed but we had better settle with all those who *will* accept the \$1000 anyhow and let the others wait awhile.

“If Mrs. Krauss accepts I think we had better get assignment from her & Mrs. Pickens as *soon as we*

*can*. If they accept, it means that Mrs. Wendt accepts also. If the Topeka heirs are eliminated from a possible contest in court, I feel that there is less likelihood of the 'foreign' heirs making any fight. I think K's decision will also decide Charles case as Chas. wrote him about it.

"If any of the others write me will *post you immediately*." [Tr. p. 287.]

The next letter to the administratrix appearing in the record, is dated July 25, 1904 [Tr. pp. 398-401.], and to which we ask the court's particular attention. It is an express declaration of the misrepresentations and concealments made by the trustees to obtain these releases, and is in conformity with the entire transaction from beginning to end, to-wit: To obtain from the heirs, assignments of their interest in the estate, to the administratrix for a grossly inadequate consideration or no consideration at all.

On August 13, 1904, Campbell wrote:

"K's (Krauss') *confidence* in me & his influence with the others is helping me greatly in getting settlement." [Tr. p. 401.]

It was represented to the brothers and sisters of Ferdinand Fensky, by these trustees, that the *share* of each heir would be \$1000, if *all* the notes were collected. [Tr. pp. 366, 392-395, 382, 383.] That this representation was *false* and known by the administrators to be *false* is conclusively shown by the following excerpts from letters that passed between them, in regard to the purchase by the *administratrix* of the



share of the heirs for \$1000 each. Campbell in a letter to her, dated July 16, 1904, says:

“*You will not only make money by it as an investment*, but it will avoid the possibility of any contest in the Probate Court.” [Tr. p. 398.] In other words, she would make money by the purchase on *just what was inventoried* and it would avoid the possibility of bringing into the Probate Court the assets concealed by the administratrix. In another letter the administratrix is advised that if distribution is made through the court that she *certainly* would realize less money out of the estate [Tr. p. 402], and in another letter great fear is expressed lest one of the heirs compel court proceedings and have it disclosed that it might pay him a *good deal* better to take his share than to sell out for \$1000. [Tr. p. 418.]

On Aug. 14, 1904, written by Campbell to the administratrix, the following appears:

“In the case of such distribution you would lack from \$2000 to \$4000 of getting as much out of the estate as you will if you buy out the other heirs for \$8000.” [Tr. p. 402.]

The \$2000 to \$4000 above mentioned, to be made by the *administratrix* in the purchase from the *cestui que trusts*, of their interest, was the sum to be realized from the notes and mortgages contained in the Kansas inventory, *only*, and did *not* include any of the property in the *California estate*, nor any of the other *assets concealed*, which would add *many thousands of dollars* to the above sum.

In the same letter he wrote:

"I want to agree with you beforehand about my compensation, as administrator of the estate, so that I will not have to raise that question in court at all when I make my final report.

"There are many advantages to you in buying out the heirs, if it can be done, rather than have distribution made through the court where many questions of dispute might arise, and much costs be made, and with certainly less money realized out of the estate by you. \* \* \*

"I have already got assignments from four of the heirs and fully expect to settle the same way with all the rest, but may be disappointed in Frederick. *I don't care for them to know how much money I have already collected on the notes, nor how much more I can collect soon, if necessary.* ' If they all sell out, then it is nobody's business but your's about the character of the estate, and if you are satisfied with what I turn over to you, that is the end of the business, without making a detailed report in the Probate Court of the amount of *cash* collected on the notes that I have inventoried.

"Let me hear from you soon, so that by the time I finish my negotiations with the heirs I will know how to frame my report, with the view of closing up the estate and getting my discharge as administrator.

"All the notes can be collected except the little Stump note. The F-note may have to be partly *traded* out, *but all the rest are as good as cash.*" [Tr. pp. 402, 403.]

He later wrote that *even the Stump note* could be collected. [Tr. p. 441.]

On August 26, 1904, he wrote:

"I wonder why Richter does not send on the assignment. Have not heard a word from him since I sent it to him through you. I told you in my last card that Frederick decided not to sell out his interest, but I have hopes of him yet if all the others sell, as I feel sure they will. \* \* \* Keep me posted if Frederick writes you." [Tr. p. 405.]

Campbell haunted by the ghost of a possible discovery of the contracts, etc., by the court, on Sept. 2, 1904, wrote to Mrs. Fensky:

"I still *hope* that it will turn out all right, but I *hate to have inquiries made of the court* here that may stir up a discussion about the matter, especially as Frederick is still balking and Richter delays in sending any assignment for his mother. I suppose there is nothing to do but wait for developments. [Tr. p. 406.]

Then on September 5, 1904, Campbell wrote to the California administratrix as below, telling her of the illegal use he was making of the estate funds, and as will later appear, out of that *same fund* he was paid for this service *alone* (obtaining the assignments from the heirs), the extraordinary sum of \$3,000.

"Of course I have used *estate* money, \$5000, to buy out the five heirs who have made assignments, but remember that I am making these purchases *as your agent and supposedly* with *your* money and not as administrator of the estate. So that if I send you any estate money it is not upon the theory that I have made any distribution to the others, but upon the theory that the risk is so slight that I as administrator

can afford to take that risk. I will prepare a letter for you to address to me, as a protection to me in case of a *possibility* of any question being raised as to my right to advance you any money before being so ordered to do by the court. After I receive your request I think I will send you receipt to sign for \$5000, I have already advanced you to purchase the interests of Augusta, Louisa, George, Charles and Johanna. It occurs to me just now for the first time that I had better send you such receipt in this. So sign and return it the next time you write. If you have any doubt about the correctness of my views about these matters be sure and consult Judge Goodrich before you act. I often wish I could talk to you about them face to face as we are all liable to be misunderstood when depending entirely on written communication. I feel sure tho' that you will appreciate that it is *you and your* money that is buying out the other heirs and that my connection with the transaction is not as administrator of the estate, but as your agent, just as I am acting in regard to your other individual property here." (The italicized words are underscored in the original letter.) [Tr. p. 407.]

On September 14, 1904, Mrs. Fensky wrote to Campbell:

"I wish Mr. Campbell, often times that you and I could have a heart to heart talk, but we will have to be satisfied with writing and be very patient and don't try to hurry matters too much. I do hope matters will come out satisfactorily yet." [Tr. p. 408.]

In response Campbell wrote on September 21, 1904:

"I have just this moment received your letter of 14th inst. enclosing one from Judge Goodrich, and



this will serve as an answer to both. I think the judge did not catch my idea when I wanted you to write to me to advance you \$8000. You will notice I did not want you to *date* that letter. Because, as you will readily see, I wanted it to cover the \$5000 I have already advanced in paying for assignments, and enough more to let you have what you needed for present purposes. \* \* \*

“Now I want the letter without date (unless you choose to have it bear a date prior to my first advancement) and then I want your receipt for \$5000 which will show that under and by virtue of your request I advanced you that much money. \* \* \* When I get such a letter I shall feel perfectly safe in sending you as much as \$3000 more of the estate money *without asking the court anything about it.* \* \* \*

“And, by the way, *I have made no showing in this court as yet that there are any other heirs besides you;* and until it is fully demonstrated that *we (you)* cannot buy out the others, *I don't want to make such showing.* \* \* \* The judge is busy trying to get elected again and I am hoping we will get assignments from the balance of the heirs before his attention is called to this estate.” [Tr. p. 409-412.]

The next letter in the record written to Frederick Fensky, is a repetition of the representations made to the heirs as to the *condition* of the estate, which is false, and known by the trustees to be false. The letter is dated Oct. 7, 1904, and is in part as follows:

“She (Mrs. Fensky) did not think at first that she could give that much (\$1000) to each one and take all chances of collecting the *doubtful claims* and pay all the costs and expenses of administration. And if

collection of the poor claims is attempted to be forced it is very doubtful about her getting back what she has paid the others for their shares." [Tr. p. 413.]

It will be noted that no mention is made to the *heir* that the "money paid to the others" was estate money to which they were then justly entitled. In effect, these trustees reached into the pockets of the heirs for the money which they paid to them for their own property. In this same letter he refers to "doubtful claims" [Tr. p. 413], although he wrote to Mrs. Fensky in August that the notes were "*as good as cash*" [Tr. p. 403], and he later referred to them as "*these so-called doubtful notes.*" [Tr. p. 425.] In no sense were these trustees making a full and fair disclosure as the law required.

Campbell wrote to Jeanette Fensky on October 20, 1904:

"I wish I had those assignments here in case Frederick calls on me. You don't express any opinion ab't the delay of Richter. What do you think of it? Can't you frame some good excuse for writing to him and asking him without appearing too anxious? \* \* \* If you hear anything from Richter *be sure* and let me know.

The only thing that concerns me about Frederick is that he may go into Probate Court and have me cited to make a report, and then *ask that what I have already collected be distributed, or in other words have it disclosed that it may pay him a good deal better to take his share than to sell out.* Whereas if you can become the sole owner of the whole estate before I am called upon to make a report, I can make my

report a *final* report and get an order to pay over everything in my hands to you without necessarily disclosing to the world how much I have collected on the notes. *A receipt from you for all notes and moneys in my hands would satisfy the court and entitle me to a discharge.*" [Tr. pp. 416-418.]

He subsequently gets from the *domiciliary administratrix* such a receipt and files it in the Probate Court. [Tr. pp. 307, 308.]

On January 9, 1905, Campbell wrote to the administratrix referring to his success in buying the interests of the heirs for her, he wrote:

"I think in this whole matter *I have been very fortunate in having the friendship and confidence of Mr. Krauss.*" [Tr. p. 424.]

And in the same letter, referring to his negotiations with Frederick Fensky, said:

"In case Frederick fails to write to you, suppose you talk with Judge Goodrich and let me know the very most I may offer him in case he will not settle for \$1000 and still shows disposition to sell and assign his interest. *If his fool lawyer knew anything he could go into our Probate Court here and have me cited to make a report which would show that I collected more money on these so-called doubtful notes than perhaps he thinks I have; and for your interest I would rather not do that if I am compelled to. If we can buy him out I will make you full and complete statement of all money collected, and then when you receipt for such moneys and for balance of notes and mortgages in my hands the Probate Court will discharge me as admin-*

istrator because there will be nobody else in all the wide world to object to it.” [Tr. p. 425.]

On January 24, 1905, Campbell transmitted to Mrs. Fensky the assignments which he had obtained from six of the heirs, and in that letter, again referring to Frederick Fensky, said:

“If Frederick sells out to you I think I will not need them here, but as yet I have heard nothing more of or from him. How would it do for you under Judge Goodrich’s advice, to write him, being very careful of course not to complicate me in any way as *ad’r*? If Laura told me correctly, he thinks *I* am the one to blame and it might be well enough to let him remain under the impression that it is not to *my* (selfish) interest for him to sell out, but to have this matter hang on the full three years, but from *your* standpoint it makes a good deal of difference, since you have spent \$7000 to buy the others out, to save all the costs possible in order to come out even. Tell him that the debtors are writing you to reduce interest, give more time, throw off part of debt &c &c. (I have directed some who have applied to me to write you) and that if you had his interest you could make new deals with them and perhaps get out whole, but that surely under all circumstances he would not ask you to pay him more than the \$1000 that each of the others accepted. You might also mention that Ferdinand intended for you to have *all his property*. \* \* \* If you *should* write him send me a copy of your letter.” [Tr. pp. 427-428.]



The foregoing letter of Campbell's written to the administratrix is but another example of the *conspiracy to deceive* and *concocted* for the occasion.

On January 31, 1905, he wrote as follows:

"Am anxious to know what you think or have done about my suggestion that you write Frederick." [Tr. p. 428.]

On Feb. 9th, 1905 Campbell wrote:

"You say you wish Mrs. Tuttle could make a new loan and pay off her mortgage. This is not *wise* from your standpoint as long as Frederick has his interest in the estate. \* \* \* But if it is converted into cash and he finds it out, he will be coming into court and asking for a division, and will get his \$1000 without selling out at all. The unpaid paper is one of the best arguments to use to induce him to sell out for cash, and let you run all the risk of *collecting bad debts*. So don't worry about the Tuttle mortgage. It is *perfectly safe* and you will get the money on it in due time if you can only buy out Frederick's interest. \* \* \* I will hurry matters along to a close and render you a full account of everything, if we can only get him out of the way. *I don't want him to know how much cash I have already collected for the estate unless he compels me to disclose the fact by making me make a report to the court. If you do not thoroughly understand the point I am trying to make please consult Judge Goodrich whom I am sure will agree with my view of the matter.* So far the court has said nothing to me about the estate since I filed my inventory, and *as long as the court lets me alone it is to your interest for me to let the court*

*alone* until you buy Frederick out. If, and when, you buy him out, I will soon get busy in the way of collecting the paper still unpaid." [Tr. p. 430.]

Finally resort was had to the writing of a letter to the brother, Frederick, by Mrs. Fensky, the administratrix, who first submitted a draft of same to Campbell [Tr. pp. 596, 597] who, in turn, struck out certain portions of what she had prepared and interlined in pencil what she should write in lieu thereof. Defendant Farnsworth testified that she wrote the first draft and the *corrected letter* that was mailed to Frederick, at Mrs. Fensky's directions. The first page of the instrument appears on page 597 of the transcript, and the remainder on pages 593-596, the portions appearing in capitals were suggested by Campbell and the remainder by Mrs. Fensky. The portions rejected by Campbell which appears in small capitals near the top of transcript, page 596, contained the word "contracts." This word Mr. Campbell never let appear in any communication with either of the brothers and sister, but it frequently appeared in the letters *to* and *from* the administratrix.

In transmitting the corrected draft of this letter to Mrs. Fensky, Campbell wrote to her on February 25th, 1905, as follows:

"Just now got yrs. with one you prepared for me to forward to Frederick if I approved of it. Am sorry to have to raise any objection to it, *but there is one clause about the addition property* (contract property) *that I am afraid to risk* & I therefore return the letter

for you to make some change in it. I also return his letter. Should he treat the property conveyed as of the date each deed was *signed*, then I am afraid he will claim that the balance due on each lot, & which is *now evidenced by notes & mortgages made to you*, was & is *personal property belonging to the estate* \* \* \* So we want to *treat the Addn. property* just as we do the Goff, the Pruessner & the Rost properties & *just as tho' there were no contracts of sale in existence—simply treat all of it as real estate that Ferdinand died seized of* & which went to you as his sole heir at law & of course which you can do as you please with. *So I suggest that you change your statement about the Addn. property as I have indicated*, so that if he examines the records & *finds the mortgages made to you on the property* he will not be so apt to claim that they *represent a credit that was due the estate from the Addn. people at the time F died.* \* \* \* Get your letter off to him as soon as possible with some *plausible excuse* for your delay and keep me posted.” [Tr. pp. 433, 434.]

The above is the letter of which the trial court made particular mention in his opinion. [Tr. p. 197.]

Frederick finally, on March 15, 1905, “came across.” This is chronicled in Campbell’s diary [Tr. p. 457], as follows:

“Mar. 15, 1905. Received Frederick Fensky’s assignment. \* \* \* She has now bought out all the other heirs and in doing so, thru my instrumentality, I have spent for her \$8016.10.”

The next step in the transaction was a mild controversy between Mr. Campbell on one side and Mrs.

Fensky and her California attorney on the other in regard to the amount of his fees as appears from Mr. Campbell's letters appearing at pages 438, 439 and 434, of the transcript. This question having been finally adjusted, Mr. Campbell filed his petition for final discharge containing no itemized account of monies received, but in lieu thereof this statement:

"Since the appointment of this administrator said Jeanette Fensky has purchased all the right, title and interest of each of the other heirs in and to said estate and that she is now the only heir at law interested in the settlement thereof." [Tr. p. 303.]

He asked the court to order that upon filing receipt from *Jeanette Fensky for all property in his hands belonging to the estate he be discharged*. [Tr. pp. 306, 307.] Upon filing such receipt order for final discharge was entered. [Tr. p. 307, 308.]

In order to throw additional light upon the breach of duty by these trustees, we revert back to some of their declarations in reference to their acts.

The administratrix not satisfied with the concealment of assets, actively and knowingly misrepresented the value and condition of the estate even as contained in the inventories. Their letters contained such language as "*these so-called doubtful notes*" [Tr. p. 425], referring of course, to the statements made to the heirs as to the collectability of the paper, and, that, the *administratrix* was taking a *great risk* in the purchase of their interest at \$1000 each, because of the *doubtful claims*. [Tr. p. 413.] In another letter Campbell,



writing to the California administratrix, expresses great *fear* lest one of the heirs who had not assigned his interest in the estate compel him to make a report in Probate Court, “and then ask that what I have already collected be distributed, or in other words *have it disclosed that it may pay him a “good deal” better to take his share than to sell out.*” [Tr. p. 418.] In time their design was fully accomplished—every heir had assigned his interest to the administratrix. Campbell wrote to her on the day of procuring the last assignment, and in reference thereto, as appears in the quotation below:

“I think it is no one else’s business *how much up to this time, has really been collected*, and for your interest I think it best not to disclose it, for the inspection of the heirs who have sold out. \* \* \* For *one* of the inducements for them to sell out was the supposed doubtful of much of the paper and I see no good reason *for showing them that they might have fared better not to have done so.*” [Tr. p. 435.]

Campbell wrote to Mrs. Fensky on Apr. 11, 1905, again advising that he had used *estate money* to *pay for the assignments of the heirs*, and that, on that account had charged \$11016.10. [Tr. p. 442.] His diary and accounts [Tr. pp. 457, 474, 481] show that he paid to the heirs \$8016.10, leaving a balance of \$3000 for his services in securing the assignments from the *cestui que* trusts.

Campbell wrote to the administratrix relative to his charges as follows:

"I know they are not steep. *I know I have saved you money, even after my charges are paid.*" [Tr. p. 446.]

We do not know the exact amount of his charges; we do know, however, that he was paid as attorney and agent of Jeanette Fensky, as administrator and received an additional \$3000 for his services in procuring the releases from the heirs, *all out of the estate of Ferdinand Fensky* [Tr. pp. 442, 444] allowed to him by the administratrix.

The foregoing excerpts from the letters show *fraudulent active concealment*, and *misrepresentations by these trustees* in obtaining the quitclaims and releases, each of the actors in the fraud benefiting by the transaction, Jeanette Fensky, in obtaining large properties without paying anything of value therefor, and Campbell benefiting by a *treble* compensation.

In the following pages we will show the manner and means used by the administrators in concealing certain notes and monies belonging to the estate.

### **The Concealment of Certain Notes and Monies None of Which Were Inventoried in the Estate of Ferdinand Fensky.**

Mr. W. C. Stein testified that at the time of Ferdinand Fensky's death he owed said Fensky the sum of \$2400 on account of two notes. [Tr. p. 261.] That he thereafter changed these notes into the name of Mrs. Fensky, at her written request, into one note of \$2400. [Tr. pp. 265, 263-265], and dated said

note *prior* to the death of Ferdinand Fensky. [Tr. pp. 262, 263, 264.] \$1800 of this note was paid directly to Jeanette Fensky [Tr. p. 262.] The remaining \$600 owing at the time of her death was paid to her administrator, J. H. Merriam. [Tr. pp. 262, 266, 459, 607.]

The \$1800.00 so paid on that note which belonged to the estate of Ferdinand Fensky, was appropriated by her individually to her own use and purposely concealed by her from such estate and from the knowledge of these complainants and the remaining \$600, which was evidenced by a new note of that amount, owing thereon at the time of the death of Jeanette Fensky, was paid to J. H. Merriam, the administrator of her estate [Tr. pp. 262, 266, 459] and he in turn likewise suppressed and concealed it from her estate, and omitted it from his inventory and accounts. [Tr. pp. 576-578, 653-656.]

And yet the trial court has said that there was no fraud of any kind committed, whilst in this one instance alone appears conclusively an egregious act of fraud.

Frank B. Simms testified: "I borrowed money from Ferdinand Fensky prior to his death" [Tr. p. 320] and that prior to his death he "never had any dealings with his wife, Jeanette Fensky." But we find in the evidence the following in a letter from Mrs. Fensky to Campbell, dated Oct. 21st, 1903:

"I have sent you the Sims note some time since, to have chattel mortgage renewed, and haven't heard whether you received same or not." [Tr. p. 359.]

This note the administratrix never accounted for but converted it to her own benefit.

In Campbell's diary under date of 28th Oct., 1903, we find:

"Wrote a postal to Goodrich telling him I was treating the Simms note as belonging to Mrs. Fensky." [Tr. p. 455.]

On a torn calendar leaf Campbell wrote to Mrs. Fensky, the administratrix:

"Remember I am treating the Simms note as yrs." [Tr. p. 286] and see [Tr. pp. 455, 456.]

Nowhere in the record does it appear that the same came into the hands of Mrs. Fensky, except as administratrix of the estate of Ferdinand Fensky. This chattel mortgage due to said Fensky [Tr. p. 455] was collected by Campbell and remitted to Jeanette Fensky [Tr. p. 456], the California administratrix.

The note of George Kimmerle was manipulated in the same manner, Campbell writing to Mrs. Fensky on April 2d, 1904, that he would pay "no attention to it *as administrator*" [Tr. p. 377], also [Tr. p. 378]

When Ferdinand Fensky died \$942.82 stood to his credit on the books of the Citizens State Bank of Topeka, Kansas. Sept. 24, 1903, Mrs. Fensky's California lawyer wrote Mr. Campbell:

"She says that she wants you as *administrator* to go to the bank and get what money there is paid upon the contracts and send to her and she will receipt for the same." \* \* \* I do not suppose that the bank would send it to her, as it *would not be proper* for



them or her to do any business of that kind outside of yourself as the agent for her or as the *administrator* of the estate. [Tr. p. 343.]

To this Campbell replied on Sept. 28th:

“I will follow instructions about money in the bank and report soon. I have no doubt they will pay it over to me on my receipt for same.” [Tr. p. 349.]

He again wrote Goodrich on Oct. 2.

“The Citizens State Bank wanted to wait till after the 1st of this month before it prepared its statement and hands over the money and papers in its hands and I have not been in since to get the same.” [Tr. p. 351.]

Under date of Oct. 5th the following appears in Mr. Campbell’s diary:

“I left receipt at Citizens State Bank for the Fensky money. Later in the day the bank sent me draft payable to Jeanette Fensky for \$886.57 and draft payable to me for \$27.00 having charged \$2.25 for cost of exchange and wrote me that it still had a balance in its hands of \$25.00.” [Tr. p. 454.]

The next day Campbell wrote to Mr. Goodrich:

“I went to the Citizens State Bank yesterday and got statement of account with Fensky, which herewith send you and which shows a balance (after deducting charges of \$2.24) *due Fensky*, \$942.82.” [Tr. p. 355.]

On Oct. 12th, Mr. Goodrich wrote Mr. Campbell:

“Your letter of the 6th inst. with the three drafts, one of \$886.57 and the other two of \$27.00 each, are at hand, also the bank statement.” [Tr. p. 358.]

H. C. McKinley, assistant cashier of the Citizens State Bank in Topeka, after producing receipts signed by "M. T. Campbell, Agt. of Jeanette Fensky, testified,

"My recollection is that the money on deposit in the bank that was taken up by these checks was in the *estate of F. Fensky*, M. T. Campbell, administrator." [Tr. pp. 309, 310.]

On Aug. 3d, 1903, three days before his death, Ferdinand Fensky wrote from California to Campbell, "I have about \$2000.00 on 4% in three banks here." [Tr. p. 282.] \$1300 of this was traced into the hands of Jeanette Fensky and receipted for by her after the death of Ferdinand Fensky but unaccounted for in his estate. [Tr. pp. 258, 252, 524-529.]

It is evident that Jeanette Fensky's purpose in concealing knowledge of the contracts for the sale and purchase of the Topeka and California land was to prevent the complainants and other heirs from asserting a claim to it and from demanding accordingly that the proceeds of the sales should be distributed according to the *law of California, the domiciliary administration*, as beneficiaries of one-half thereof. There was concealed far more in value, in this one item alone, than the amount paid to the makers of the quit claims.

These acts and omissions, purposely made, and the misrepresentations made by the administratrix in connection therewith were means adopted specially for obtaining the quitclaims, which otherwise she could not have obtained, and they constituted grossly dishonest methods of deception to accomplish that result, and they were done with the full knowledge and pre-

meditation of such dishonesty. Such acts would have been ample grounds for relief against such fraudulent and concealed deceptions in obtaining property from one who had been thus victimized as to whom there were even no *fiduciary relations* existing, but who could have been dealt with at arm's length in other respects, being in such case subject to relief at the instance of such person, from the fraud thus committed upon him, where there was no such fiduciary relation existing, it is positively beyond the bounds of contradiction that in this case at bar where it is admitted that such relations did exist, there could be no dealing at arm's length, but that on the contrary any concealment or want of disclosure of any kind with reference to the matters by the trustees, would of themselves constitute fraud and even though there had been no actual intent to defraud by the adoption of those methods. But here it is undeniable as we repeat they were the result of *actual* fraudulent premeditated methods to obtain the quitclaims.

Without recapitulating the facts and circumstances of this case as disclosed by the proof, it is very evident that the grantors were ignorant of the quantity and value of the estate they were selling, no correct information on this subject was communicated to them by the trustees but the *real value* and conditions was *concealed* and what *was* revealed was *misrepresented* as to its *true value*, and the appellants had no knowledge of the frauds until the year 1912. [Tr. pp. 283-290, 280, 542, 543.]

Campbell remitted to Jeanette Fensky, as shown by his ledger accounts [Tr. pp. 461-505] a total sum of \$56,583.73. He sent to her secured notes mentioned in his letter of April 22, 1905, and the same were receipted for by her [Tr. pp. 445-308], which notes were appraised at \$7,450.00. [Tr. pp. 295-299.] All of the money and notes mentioned were the proceeds of the estate of Ferdinand Fensky which came into Campbell's hands collected from the assets of the said estate. In addition to the above remittances to the administratrix, Campbell retained, with the consent of Jeanette Fensky, the notes and mortgages belonging to the estate of Ferdinand Fensky as specifically set forth in his letter to her. [Tr. p. 445.]

The inventory filed in the California estate showed a total valuation of property in California of \$6700.00. [Tr. pp. 526-529.] This is the total value of property accounted for by the administratrix in the estate of Ferdinand Fensky.

A tract of sixty acres of land in Orange county was in the inventory valued at \$1400.00. [Tr. p. 528.] The witness, John Davis, testified that he had bought the south thirty acres of this same tract from Mr. Fensky on contract for \$1700.00, and at the time of Fensky's death he owed him \$1650.00. The balance due F. Fensky at his death was paid to Jeanette Fensky. This was not accounted for in the estate. About two years afterward he and his son-in-law bought from Mrs. Fensky a piece of land on the north side of the thirty acre tract for \$100.00 per acre. [Tr. p. 605.]



Mr. Head, another witness who had known the sixty acre tract for thirty years, testified that at the time the inventory was filed it was worth \$40.00 to \$50.00 per acre—more than double the amount at which it was inventoried. [Tr. p. 605.]

Lots 9 and 10 of Peck's subdivision of block 74 in the city of San Pedro were valued in the inventory at \$3000.00. [Tr. p. 528.] Louis Hansen testified that at the time the inventory was filed the said lots were worth about \$10,000.00. [Tr. p. 523.]

Eleven lots in the Carolina Tract were listed in the inventory at \$600.00, the witness, Hensen, testified that at the time the inventory was filed in the estate they were worth \$4000.00. [Tr. p. 523.]

The plan was to conceal all of the property that could possibly be concealed, and as to the portion that could not be concealed and that they were forced to list in their inventories, was to value it as low as possible. The total value of the estate (as far as has been ascertained by complainants, after extraordinary efforts to learn the facts) in California and Kansas was about \$80,000.00, as against the valuation shown in the inventories of about \$24,000.00. [Tr. pp. 529, 301, 302.] The settlement was made with the heirs upon the representation that the ultimate value of the estate to be distributed would be about \$16,000, after all "expenses" and "losses" were paid.

On or about April 1st, 1905, Jeanette Fensky filed a pretended final account and petition for distribution, in which she represented that she had secured the

interests of all the brothers and sisters and the other heirs at law of her deceased husband and that she was the only one entitled to the said estate. [Tr. pp. 634-639.] On April 11th, 1905, the account was settled and distribution was ordered. [Tr. p. 641.] The decree for final distribution did not recite the status of the property as separate or community.

All of this estate having been the separate property of Ferdinand Fensky at the time of his death, and Jeanette Fensky, having obtained the respective shares of the complainants through deception and fraud, that she held the same during her lifetime in trust for complainants, is undeniable.

This principle is recognized by the law of the state of California in the form of a code section, to-wit: Section 2224 of the Civil Code, which reads:

“One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.”

### **Equitable Conversion.**

*A sale of land on contract works an equitable conversion. The vendee becomes the equitable owner of the real estate, and the vendor, the equitable owner of the purchase money.*

Equity considers as done that which is agreed to be done. The vendee under a contract for the sale of land takes the equitable title, while the vendor holds

the legal title in trust for the purchaser, and as security for the purchase money due him.

Boone v. Childs, 35 U. S. (10 Pet.) 177, 225,  
9 (L. Ed.) 388;

Lewis & Hawkins, 90 U. S. (23 Wall.) 119, 125,  
23 L. Ed. 113;

572 L. R. A. 643;

Bissell v. Heyward, 96 U. S. 380, 586, 24 L.  
Ed. 258;

Sparks v. Hess, 15 Cal. 186;

Gouldin v. Buckelew, 4 Cal. 107.

At the outset let us observe that the Fensky contracts were binding enforceable contracts. [Tr. p. 507.] They were binding obligations on both parties. Mr. Fensky was bound to convey upon receipt of the purchase price and the vendee was bound unconditionally to pay the price named. The purchasers were all in possession of the property they contracted for and were paying taxes thereon. [Tr. pp. 340, 507.] The contracts were enforceable by either party against the other. The vendees complied with their contracts fully, and an equitable conversion took place at the time the contracts were signed by the parties. These contracts of sale of real estate by Fensky worked an equitable conversion of the land into money. His interest ceased to be real estate; it became a *chose in action* and a *personal* demand for the consideration money.

In the case of *William v. Haddock*, 145 N. Y. 144, 39 N. C. 825, he court said:

“The general rule in regard to contracts for the sale of land is that the owner of the real estate, from the time of the execution of a valid contract for such sale, is to be treated as the owner of the purchase money, and the purchaser of the land is treated as the equitable owner thereof.”

In the case of *Bender v. Luckenbach*, 162 Pa. St. 18, 29 Atl. 295, it is held that a contract for the sale of real estate is considered in equity as a conversion of the land into money. The vendor's interest ceases to be real estate; *it becomes a chose in action and a personal demand* for the consideration money, *which in case of death goes to his personal representative, and the legal title is held only as security for the payment of the debt.*

In *Whittier v. Stege*, 61 Cal. 240, it was held:

“One who enters into possession of land under an agreement to purchase is regarded in equity as owner of an equitable estate in the land, until the performance of his agreement by payment of the purchase money, and then, after payment in full, according to the terms of the agreement, the equitable estate, with which he was clothed before performance, changes into an indefeasible estate; and in either case, he is regarded as the owner of the land and not subject to an action of ejection by his vendor; because, although the vendor is in law the owner of the legal title, he holds it simply as a trustee for his vendee, charged with the duty



to convey it to his vendee on demand." (Citing *Love v. Watkins*, 40 Cal. 548.)

In *Willis v. Wozencraft*, 22 Cal. 607, it was held that a vendee, rightfully in possession though having made no payment on the purchase price is the equitable owner of the land, and that courts of equity must protect him, and that the general principle is:

*"That from the time of the contract for the sale of land, the vendor, as to the land, becomes a trustee for the vendee, who has a lien upon the land therefor. The position of a vendor, where the purchaser is in possession under the contract, is analogous to that of a mortgagee."*

This case is cited in *Whittier v. Stege*, *supra*.

In *Miller v. Waddingham*, 91 Cal. 377-381, the court decided that where the vendee was rightfully in possession under a contract of the vendor to convey to him, that although the purchase price was not yet paid, nevertheless the position of the vendee was virtually that of a mortgagor, and that the vendor had no greater rights than that of mortgagee.

See also:

- White v. Sage*, 149 Cal. 613;
- Erhart v. Mahoney*, 170 Cal. 148;
- Sparks v. Hess*, 15 Cal. 186;
- Hill v. Grigsby*, 32 Cal. 55;
- Watson v. Sutro*, 86 Cal. 527;
- Bodley v. Ferguson*, 30 Cal. 512;
- Baldwin v. Morgan*, 50 Cal. 585.

In the case of *Griffin v. Board of Review*, 184 Ill. 275, 56 N. E. 397, the contract provided that if the purchaser made the payments and performed the covenants set forth in the contract the seller would convey the property to the purchaser, and the purchaser covenanted and agreed to pay the purchase price set forth; that if the purchaser failed to make any payment, or to perform any of the covenants contained in the contract, the contract and all payments made thereon should *at the option of the seller* be forfeited and determined. It was held that the debt due to the seller was personal property and that the retention of title by the seller was but a mode of securing payment of the purchase price of the land.

In the case of *City of Marquette v. Michigan Iron & Land Co.*, 132 Mich. 130, 92 N. W. 934, the contracts contained an agreement on the part of the vendor to sell certain land upon the payment of a specified sum, which the vendee expressly agreed to pay. The contracts contained the usual clauses of forfeiture and an agreement that the vendee should pay all taxes or assessments upon the premises, and provided for a deed to the vendee when all his agreements and undertakings were performed. The court held that by the terms of the contracts an equitable title to the property was at once transferred to the vendee, and that from the time the contracts were made the vendor held the legal title only as trustee for the vendee. The court said:

“The vendor has in effect exchanged his property for the unconditional obligation of the vendee, the performance of which is secured by the retention of the legal title. The fact that the vendee in the case of the land contract may when making his final payment demand a conveyance, does not distinguish the obligation from that of a credit secured by a mortgage, as the mortgagor may in making his final payment demand a discharge of the mortgage. \* \* \* The resemblance between these obligations and credits secured by purchase money mortgages may best be described by stating that they differ only in this, that the vendor has a remedy to enforce his rights which is not given to the mortgagee, namely: he may take immediate possession of his security. Such an inconsequential difference affords no ground for a legal distinction.”

The court cites as authority:

Cooley on Taxation (2 Ed.), p. 78;

People v. Trustees, 48 N. Y. 390;

Ouachita Co. v. Rumph, 43 Ark. 525;

State v. Rand, 39 Minn. 502, 40 N. W. 835;

Perrine v. Jacobs, 64 Iowa, 79 19 N. W. 861;

People v. Rhodes, 15 Ill. 305;

People v. Worthington, 21 Ill. 170, 74 Am. Dec. 86;

Griffin v. Board, 184 Ill. 275, 56 N. E. 397;

Adams v. Clark, 80 Miss. 134, 31 So. 216.

The legal effect of such a contract is to create new or additional property,—a legally enforceable demand

in favor of the vendor to recover from the vendee the unpaid balance of the purchase price; and this remains the rule even if the contract provides for forfeiture upon default of the purchaser.

Griffin v. Board of Review, *supra*;

Reassessment of Boyd, 138 Iowa 583.

In the case of *Dallas County v. Boyd*, 138 Iowa 583, 116 N. W. 700, 17 L. R. A. (N. S.) 1220, it is held that a contract that is not a mere option, but is a contract that may be enforced against the purchaser by proper action in court, in such a credit as is subject to taxation.

In the note following *Dallas County v. Boyd*, in 17 L. R. A. (N. S.) 1220, upon the subject as to whether the amount due under an enforceable contract for the purchase of land is a credit subject to taxation, it is said:

“All the courts seem to be at one in holding with *Dallas County v. Boyd* that the amount due under an enforceable contract for the sale of land is a credit, and as such subject to taxation in the hands of the vendor, although, as was the case in practically every instance, the contract provides for forfeiture upon default of the purchaser.”

The following cases are cited in the note as sustaining the foregoing statement:

Clark v. Horn, 122 Iowa 375, 98 N. W. 148;

Perrine v. Jacobs, 64 Iowa 79, 19 N. W. 861;

Adams v. Clark, 80 Miss. 134, 31 So. 216;



Cross v. Snakenberg, 126 Iowa 636, 102 N. W. 508;  
Rheinboldt v. Raine, 52 Ohio St. 160, 39 N. E. 145;  
Marquette v. Michigan etc. Co., 132 Mich. 130, 92 N. W. 934;  
State v. Rand, 39 Minn. 502, 40 N. W. 835;  
Griffin v. Board of Review, 184 Ill. 275, 56 N. E. 397.

Such is the rule in Kansas:

Gilmore v. Gilmore, 60 Kan. 606; 57 Pac. 505;  
Williams v. Osage County, 84 Kan. 508; 114 Pac. 858;  
Laughlin v. Braley, 25 Kan. 147 (2d Ed. p. 102);  
Jones v. Lapham, 15 Kan. 540 (2d Ed. p. 408);  
Seaman v. Huffaker, 21 Kan. 262 (2d Ed. p. 191);  
Burke v. Johnson, 37 Kan. 337, 15 Pac. 204;  
Usher v. Hollister, 58 Kan. 431; 49 Pac. 525;  
Curtis v. Buckley, 14 Kan. 449, 454 (2d Ed. p. 345).

See also:

Jones v. Hollister, 51 Kan. 310, 32 Pac. 1115;  
Courtney v. Woodworth, 9 Kan. 443;  
Campbell v. Kansas Town Co., 69 Kan. 314, 76 Pac. 839;  
Comr's. of Dickinson Co. v. Baldwin, 29 Kan. 538.

When a person holds a contract for the conveyance of land to himself from the legal owner upon the payment of certain installments, is in possession of the land and has paid interest on the purchase money, he is the equitable owner of the land, and has such an interest therein that he may encumber such interest by a real estate mortgage to secure a loan.

Laughlin v. Braley, 25 Kan. 147 (2d Ed. p. 102).

In *Williams v. Osage County*, *supra*, the contracts provided that the respective purchasers should pay the purchase price as specified in the contracts. Upon the question as to whether the contracts were personal property belonging to the vendor, the court said:

“Each of these contracts includes an unqualified promise to pay—the promise of the purchaser to pay to the seller the remainder of the purchase price of the land, and the seller of the land holds the legal title thereto as security for the fulfillment of such promise. The contract in the possession of the seller is evidence of the indebtedness. The situation, logically, is not much different than if the seller had conveyed the land to the purchaser and taken a note and mortgage back to secure the remainder of the purchase price. The contract as truly constitutes a debt and security therefor as would a note and mortgage. \* \* \* The seller holds the legal title to the land in trust for the purchaser upon his complying with the conditions of the contract, and, undoubtedly, the seller could convey the legal title and assign this contract and his grantee would assume the same relations

to the purchaser of the land that the vendor had held. \* \* \* Such transfer would not give to the vendor's grantee the right to possession of the land, nor the *equitable title to the land, which under the contracts are possessed by the purchasers.*"

After citing and quoting from a number of authorities, the court, in the *Williams* case, further said:

*"The purchaser became the owner of the land; the seller became the owner of the debt. \* \* \** The same may be said, practically, of 'Exhibit A,' except as to the last paragraph thereof, in which it is provided in substance that, if the purchaser fail to make the deferred payments within a reasonable time after the same become due and payable, then the contract 'shall cease and terminate and be forever void.' *This is not making time of the essence of the contract. It is a provision in favor of the seller.*"

**The Contracts of Sale of Real Property in Kansas and in California Were the Personal Property of Ferdinand Fensky, and as Such Descended According to the Law of California.**

At the time of the death of Ferdinand Fensky, intestate, he was a resident of California. Prior to his death he had sold on contract a large number of lots in Topeka, Kansas, and a tract of land in California. [Tr. pp. 506, 605.] All of the contracts were in California at the time of his death and came into the hands of Jeanette Fensky [Tr. p. 345], the administratrix of his estate. [Tr. pp. 631, 632.]

It is the well established rule that the interest of a vendor in real estate which he has sold or concerning which he has entered into a binding and enforceable contract of sale is personal property of the vendor, and the securities for the purchase money are *personalty*, and in the event of the death of the vendor go to his personal representatives and are distributable as personal property.

Lewis v. Hawkins, 90 U. S. (23 Wall.) 119, 125;

McKay v. Carrington, 1 McLean 50, 50 Fed. Cas. No. 8841;

Secombe v. Steele, 61 U. S. (20 How.) 103;

3 Story's Equity Jur. (14th Ed.), Sec. 1612;

Pomeroy's Eq. Jur., Sec. 105;

Estate of Dwyer, 159 Cal. 680;

Watson v. Sutro, 86 Cal. 527;

57 L. R. A. 646, n.

In Henson v. Ott,, 7 Ind. 512, it is said:

"Had the lands remained unsold at the time of the intestate's death, the record would then have presented a question of construction on the statute governing the descent of real estate. *But as the land was sold in the lifetime of the intestate, the proceeds, whether secured by note or otherwise, became assets in the hands of the administrator, and without reference to the source whence derived, were governed by the rules prescribed for the descent of personal property.*"



The syllabus of this case is as follows:

“Where a man has sold real estate and dies intestate, the unpaid purchase money, in *whatever way secured*, becomes assets in the hands of the administrator, and without reference to the source whence the land was derived, the transmission of such purchase money is governed by the rules relative to the distribution of the personal property of intestate.”

The interest of the vendor in a partially performed contract to purchase land of which the vendee has been put in possession is *personalty* which passes at once to the personal representative.

Bowen v. Lansing, 129 Mich. 117, 88 N. W. 384,  
95 Am. St. Rep. 427, 57 L. R. A. 643;

The case of *Bowen v. Lansing*, *supra*, is followed in:

Crowley v. McCambridge, 154 Ill. App. 135,  
142;

Ostrander v. Davis, Ill. Cir. Ct. App. 636, 191  
Fed. 156, 159;

Cropper v. Brown, 76 N. J. Eq. 420, 74 Atl.  
987, 139 Am. St. Rep. 770;

McGregor v. Putney, 75 N. H. 114, 71 Atl.  
226, Ann. Cas. 1912-A, 193;

Strang v. Hall, 131 Iowa 583, 597, 106 N. W.  
631;

Ferres v. Poucher, 152 Mich. 254, 115 N. W.  
1054.

See also:

N. Y. C. & H. R. R. Co. v. Cottle, 168 N. Y.  
Supp. 463, 102 Misc. Rep. 30;

In the case of *Rhodes v. Meredith*, 260 Ill. 138, 102 N. E. 1063, Ann. Cas. 1914-D, 416, referring to the doctrine of equitable conversion, the court said:

“That doctrine rests on the maxim that equity regards that as done which ought to be done, and the situation presented by this record is a fitting illustration of the maxim. \* \* \* When a valid, enforceable contract has been entered into for the sale of real estate, as between the vendor and the vendee, equity regards the vendee as the owner of the land and the vendor as the owner of the purchase money, which is personalty. \* \* \* Where the owner of real estate thus enters into a valid contract for its sale, the nature of his estate, under the doctrine of equitable conversion, is changed and the real estate will be regarded as converted into personal property, and *in case of the death of the vendor before the contract is performed, it will be treated as assets in the hands of his personal representative.*”

In the case of *Keep v. Miller*, 42 N. J. Eq. 100, 6 Atl. 495, the court held that a contract for the sale of lands which equity would have enforced at the suit of the vendor, created an equitable conversion of the premises from the time of its execution, so that the widow of the vendor, the latter having died intestate after the contract was made, is entitled to her share of the proceeds as personal property.

In *Skinner v. Newberry*, 51 Ill. 203:

“Moneys due a testator at his decease, upon contracts for the sale of real estate, made by him

during his life, no deed having been executed, are to be considered a part of his personal estate, the same as other debts due the estate, and the objection, that those contracts which were liable to forfeiture at the death of the testator, cannot be considered as personalty, is without force, since the testator did not assert such right."

In *Sutter v. Ling*, 25 Pa. St. 466:

"Where a vendor under articles of agreement dies, the right to receive the purchase money passes to his personal representatives."

In *Simmons Estate*, 140 Pa. 567, 21 Atl. 402:

"By the contract for the sale of land, the estate of the decedent is converted into personalty over which the personal representatives have absolute control."

In *Clapp v. Tower*, 11 N. D. 556:

"A contract for the sale of real estate, which is valid and enforceable in equity, operates a conversion. The vendor's interest thereafter in equity is the unpaid purchase price, and is treated as personalty; the vendee's interest is in the land, and is realty. Upon the death of the vendor his interest passes to his executors as personalty, and continues as such for the purposes of administration; and where such executors have cancelled the contract of sale for default of the purchaser, and thus regained the title, they may sell and convey such real estate, and account to the court of their appointment for the proceeds as personalty, and the title so conveyed is good as against the heirs of the decedent claiming title by succession."

In 11 R. C. L. 124:

“The interest of a vendor in a partly performed contract to purchase land of which the vendee has been put in possession is considered personalty which passes at once to the personal representative.”

In *Gilmore v. Gilmore*, 60 Kan. 606, 57 Pac. 505, the court said:

“A contract for the sale of real estate works an equitable conversion of the land into personalty from the time when it was made, and the purchase money becomes therefore a part of the vendor’s *personal* estate, and as such distributable upon his death to his widow and next of kin.”

*Miller’s Admr. v. Miller*, 25 N. J. Eq. 354.

**The Contracts of Sale Were the Personal Property of Ferdinand Fensky and Descended Under the Laws of California, Where He Was Domiciled at the Time of His Decease.**

Estate of Apple, 66 Cal. 434 (6 Pac. 7);  
Whitney v. Dodge, 105 Cal. 197 (38 Pac. 636);  
Estate of Lathrop, 165 Cal. 247;  
Wilkins v. Ellett, 76 U. S. (9 Wall. 740);  
Estate of Dwyer, 159 Cal. 680, 115 Pac. 242;  
Ennis v. Smith, 55 U. S. (14 How.) 400, 14 L. Ed. 472;  
Wilkins v. Ellett, 108 U. S. 256, 27 L. Ed. 718;  
Story’s Conflict of Laws, Secs. 379, 795;  
Frothingham v. Shaw, 175 Mass. 59, 78 Am. St. Rep. 475;  
Eells v. Holder, 12 Fed. 668 (Kansas).



In *Wilkins v. Ellett*, Adm'r, 9 Wall. 740, the court said:

“It has long been settled and is a principle of universal jurisprudence in all civilized nations, that the personal estate of the deceased is to be regarded, for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile; and if he dies intestate the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened at the time to be situated.”

It was said in *Eells v. Holder*, *supra*, after citing the foregoing:

“It follows that the notes and mortgages sued on in this case were assets of the estate of Witte in the state of Ohio, and as such passed to his administrators in that state, who had, according to the plain terms of the statute of Kansas, the right to sue upon them.”

**The Courts of the United States Are Not Concluded  
in a Matter of General Equity Jurisdiction by a  
Decision of a State Court.**

These contracts for the sale of real estate in Kansas and California were *evidences of indebtedness* in the hands of the California administratrix, and all of them should have been inventoried by her and distributed in the California estate as personal property.

The learned trial court in passing upon the question of equitable conversion by the contracts of sale of real estate, by Ferdinand Fensky in his lifetime, held that he was controlled and bound by a decision of the Supreme Court of Kansas (179 Pac. 343), construing the contracts as not having worked an equitable conversion, upon being entered into by the parties thereto, and therefore, that decision was determinative of this action as to that and *all other questions involved herein*, as is shown by its opinion filed in this case. [Tr. pp. 194-199.] While the court made no specific mention in his opinion of the contract of sale for the California tract of land, by Fensky, and which was omitted from the inventory of his estate, it appears he considered himself bound by the Kansas decision as to the status of all contracts belonging to the estate of Ferdinand Fensky. Also that comity demanded that he follow that decision, and he further held that he fully agreed with the Kansas court in respect to its conclusions, in, that no equitable conversion took place. We respectfully submit that the trial court erred in each of the above holdings.

It will be observed at the outset that the Kansas decision does not deal in any respect with the construction of a local statute of the state, but exclusively with the meaning and effect of a provision in a private contract. In such a case a federal court will interpret it in accordance with general rules of law governing the construction of contracts, and will never hold itself

bound to adopt a construction which has been placed upon the contract, by the courts of a state.

Kuhn Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140;

Keene etc. Bank v. Ried, 59 C. C. A. 225, 123 Fed. 221;

(*Writ of certiorari* denied in 191 U. S. 567.)

In *Swift v. Tyson*, 16 Pet. 1, a leading case, in defining and limiting the application of section 34 of the Judiciary Act (Sec. 721 U. S. Rev. Stat.), the Supreme Court, upon the question whether the word "laws" in that section included within the scope of its meaning the decisions of the local tribunals, said:

"In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are at most only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed and qualified by the courts themselves whenever they are found to be defective or ill-founded, or otherwise incorrect."

The statute also in terms limits the application of state laws as rules of decision to "trials at common law, in the courts of the United States, in cases where they apply." It does not *therefore apply in equity*, as to which the jurisdiction of the United States courts is derived from the Constitution and laws of the Union, and is the same as that which the High Court of Chancery in England possesses and is subject to neither

limitation nor restraint by state legislation, and most certainly not by mere *oscillating* decisions.

In *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228, practically all of the previous decisions of the court are reviewed; and it is made clear, that in the case of the construction of the language of a contract, will, or other instrument of writing, that the federal courts do not follow the state courts in their construction of such instruments, as they do in the construction of statutes.

In the case of *Burgess v. Seligman*, 107 U. S. 33, 2 Sup. Ct. 10, in which a *construction of a state statute* was involved the court said:

“We do not consider ourselves bound to follow the decisions of the state court in this case. \* \* \* The federal courts have an independent jurisdiction in the administration of the state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws, \* \* \* *as they always do in reference to the doctrines of commercial law and general jurisprudence.*”

In *Neves v. Scott*, 54 U. S. 268, it is held that wherever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and the federal courts will decide what those principles are and will apply them to each particular case as may be found justly applicable thereto.



In *Jackson Co. v. Gardner Inv. Co.*, 200 Fed. Rep. 113, the court said:

“The rule applicable to proceedings as between two federal courts, that the court will be influenced by the previous action of another court between different parties with reference to the same subject matter is of little force as between state courts and federal courts, because the application of it there would be in the face of the Constitutional and statutory provisions which give citizens of different states, and aliens, peculiar privileges in litigating in the federal courts, we certainly could not apply it to a case where the *facts and the law are so absolutely and positively clear as they are here.*”

Where the question depends upon the general principles of equity jurisprudence this court will not be bound by the decisions of the highest court of the state in which the land in question is situated, but will be governed by its own view of the equitable principles. This being a suit in equity, this court will be governed by its own views of the principles involved.

Russell v. Southard, 53 U. S. 139.

An additional reason for disregarding the decision of the Kansas court is that that opinion was rendered in 1919, while the rights of the appellants herein accrued at the death of Ferdinand Fensky, in 1903.

In *Hart v. Adair*, 244 Fed. 897, 901 (C. C. A. Ninth Cir. 1917), after referring to a decision of the state court that was relied upon by one of the parties, this court said:

“That decision is not binding upon this court. It does not construe or apply any statute, nor does it create a rule of property. And even if it did, it would not be controlling here; for it was not rendered until a year after the court below decided the case which is now before us, and not until long after the rights of the plaintiffs had accrued under the assignment. A federal court is not bound by the decisions of the highest court of a state in such a case.”

In *Loewe v. California State Federation of Labor*, 189 Fed. 714, the court said that in applying general principles of equity, the federal courts determine for themselves what those principles are, untrammelled by the decisions of the state tribunals.

In *Peck v. Ayers*, 53 C. C. A. 553, 116 Fed. 273, the court in answer to a claim that the federal court was bound by a decision of a state court, said:

“But this is a mere variation of decision in respect of a *principle of general equity*, and we are not aware of any precedent for holding that a rule so established can be admitted to change the doctrines of equity as recognized and applied in the federal courts.”

The language in *Gelpcke v. City of Dubuque*, 68 U. S. 176, would indicate that even when a state statute had been construed by the state court, that the court

*“will not necessarily follow decisions which may prove but oscillations in the course of such judicial settlement. Nor will it follow any adjudication*

*to such an extent as to make a sacrifice of truth, justice and law."*

To the same effect was the holding in *Pease v. Peck*, 18 How 595, the court indicating that in its judgment if a decision can be used only as an instrument of wrong and destruction, then, *error ceases to be sacred and principles and truths ought to be reasserted.*

Particularly applicable to the trial court's reasoning that "comity" would require that he follow a decision of the state court, it is said in *Douglas v. Co. Pike*, 101 U. S. 686:

"Indeed, if a contrary rule was adopted, and the *comity* due to state decisions pushed to the extent contended for, 'it is evident that the provision of the Constitution of the United States which secures to the citizens of another state the right to sue in the courts of the United States might become utterly *useless and nugatory.*' "

To the same effect is:

*Rowan v. Runnels*, 5 How. 139.

In *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. 432, the court said:

"Indeed the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce."

Where the question involves the interpretation of a contract not in any way dependent upon the construc-

tion of the state law the federal court is not bound to follow the decision of the state court construing the contract, if such construction does not meet with the approval of the federal court, but the latter is bound to exercise its independent judgment.

Bancroft v. Hambly, 36 C. C. A. 599, 83 Fed. 444;

Foxcroft v. Mallett, 45 U. S. (4 How.) 353;  
Ohio Life Ins. & Trust Co. v. Debolt, 57 U. S. (16 How.) 432;

Russell v. Southard, 53 U. S. (12 How.) 139;

Knox & Lewis v. Alwood, 228 Fed. 753;

Edward v. Davenport, 20 Fed. 756, 762;

Keene Five Cent Savings Bank v. Reid, 123 Fed. 221;

U. S. Savings & Loan Co. v. Harris, 113 Fed. 28;

Thomas v. Hatch, 3 Sumn. 170, 23 Fed. Cas. No. 13899;

Louisville Trust Co. v. Cincinnati, 76 Fed. 296, 300.

The federal courts are not concluded in a matter of general equity jurisdiction by a decision of a state court.

Flagg v. Mann, 9 Fed. Cas. No. 4847.

In Forsythe v. City of Hammond, 18 C. C. A. 187, the court said:

“The decision of the state court which we are asked to follow seems to us to be in plain conflict



with the weight and general current of authority on the subject.”

Federal courts in exercising their jurisdiction founded on diverse citizenship are not bound, either in cases at law or in equity by the decisions of the courts of the state in which they are situated.

Snare & Triest Co. v. Friedman, 169 Fed. 1,  
94 C. C. A. 369, 40 L. R. A. (N. S.) 367.

See also:

Forsythe v. City of Hammond, 18 C. C. A. 175;  
Township of Pine Grove v. Talcott, 86 U. S.  
666;

Enfield v. Jordan, 119 U. S. 689.

THE CASE OF PICKENS V. CAMPBELL (KANSAS), 179  
PAC. 343, IS NOT RES JUDICATA AND THE COM-  
PLAINANTS ARE NOT THEREBY BARRED FROM  
MAINTAINING THIS ACTION.

The case of Pickens v. Campbell is not *res judicata* for the reason that the defendants in this suit are not the persons nor in privity with the persons in that case, and the further reason that the two actions are entirely different as to subject matter and for the further reason that if the decision in the Kansas case was a correct decision on the law as to whether the contracts constituted realty or personalty, nevertheless, the defendants in this suit are claiming rights to the property as opposed to the ownership and demands of the appellants as owners by descent and as heirs-at-law of Jeanette Fensky, and which question of owner-

ship so acquired by them, formed no part of and was in no way involved in the matters adjudicated upon in the Kansas decision mentioned. It being impossible to have been included therein, being a question peculiarly for the courts of California to determine, to-wit: the succession to property of Jeanette Fensky which was the avails of property which had descended to her from the separate estate of Ferdinand Fensky, this being a question for the jurisdiction of the California courts solely to determine, all of such property being in this state.

To make a former judgment a bar to the maintenance of the present action it must have been rendered in an action between the *same parties*, or between *those in privity* with them.

Aspden v. Nixon, 45 U. S. (4 How.) 467, 11 L. Ed. 1059;

Fowler v. Stebbins, 136 Fed. 365;

Calculagraph Co. v. *Stamp Co.*, 154 Fed. 166.

A former judgment can be pleaded as a bar only by those who were parties to the action in which it was rendered, or who are in privity with such parties.

Hibernian etc. Soc. v. London etc. Co., 138 Cal. 257.

Estoppels must be mutual. If a judgment does not bind a party it cannot inure to his benefit.

Andrews v. Pipe Works, 76 Fed. 166, 173, 19 C. C. A. 548, 36 L. R. A. 139;

In *Aspden v. Nixon*, 45 U. S. (4 How.) 467, 497, 11 L. Ed. 1059, 1074, it is said:

“The rules of evidence governing courts of justice are, that a judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, to be conclusive, must have been made, 1. By a court of competent jurisdiction upon the same subject matter; 2. Between the same parties; 3. For the same purpose.”

In *Privett v. U. S.*, 261 Fed. 351, the rule is stated in this manner:

“To render a matter *res judicata* there must be a concurrence of four conditions, viz: (1) Identity of the thing sued for; (2) Identity of the cause of action; (3) Identity of persons and parties to the action and (4) Identity of the quality in the persons for or against whom the claim is made.”

The case of *Pickens v. Campbell* and the case at bar do not come within the rule. They are not upon the same subject matter, not between the same parties and not for the same purpose. The action now pending here is not against Campbell, but against those who, after the death of Jeanette Fensky, received the benefits of the fraud committed by her, and is for the purpose of requiring them to yield up the property to which the appellants are rightfully entitled as heirs at law of Jeanette Fensky, and to account for property belonging to the estate of Jeanette Fensky claimed by them by means of deeds which were void by reason of the non-delivery thereof, and for the further pur-

pose of requiring the appellant, Merriam, as administrator of the estate of Jeanette Fensky, to account for money and property which came into his hands as such administrator and for which he has not accounted.

Defendants who were not parties to a former suit are not bound by the judgment therein.

Hibernian etc., Soc. v. London, etc., Co., 138 Cal. 257.

In order to constitute a bar to an action it should appear that the former suit was not only about the same cause of action, but between the same parties.

Chase v. Swain, 9 Cal. 130, 136.

Strangers to the record, neither party thereto nor in privity with the parties are not estopped by the judgment nor can they take advantage of it as a bar.

Irving v. Cunningham, 77 Cal. 52;

Chester v. Bakersfield, etc., Ass'n, 64 Cal. 42.

It is immaterial that they may claim under the same common source of title if there is no privity in estate.

Ingersoll v. Jewett, 13 Fed. Cas. No. 7039, 4 Bar. & A. 361, 16 Blatchf. 378.

In Estate of Freud, 134 Cal. 336, it is said:

“In order to make the decision of one court final and conclusive in another, it must be a decision of a court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is put in evidence as conclusive.”



It is plain that the Kansas court did not have and could not have had jurisdiction over the matters in controversy in the instant case, or over the appellees herein.

Jeanette Fensky was the administratrix in California of the estate of Ferdinand Fensky and M. T. Campbell was administrator of Ferdinand Fensky's estate in Kansas.

Neither is there privity between administrators of the same decedent appointed in different states.

Stacy v. Thrasher, 47 U. S. (6 How.) 44, 58,  
12 L. Ed. 337;

Johnson v. Powers, 139 U. S. 156, 35 L. Ed.  
112;

Hill v. Tucker, 54 U. S. (13 How.) 458, 14 L.  
Ed. 223;

McLean v. Meek, 59 U. S. (18 How.) 16, 15  
L. Ed. 277.

Consequently a judgment against one is not evidence against the other, and a judgment in favor of one cannot be pleaded in bar by the other.

Braithwaite v. Harvey, 14 Mont. 208, 43 Am.  
St. Rep. 625.

There is no privity between an executor in one state and an administrator with the will annexed in another, nor between administrators of the same decedent appointed in different states. Estoppels in favor of or against an executor or an administrator by judgment in one state do not bind or affect an administrator

with the will annexed or an administrator appointed in another state.

Wilson v. Hartford Fire Ins. Co., 164 Fed 817,  
90 C. C. A. 593, 19 L. R. A. (N. S.) 553.

The term "privity" denotes mutual succession or relationship to the same rights of property.

Greenleaf on Evidence, §523.

In *McIntyre v. Sholty*, 139 Ill. 171, 29 N. E. 43, it is said:

"There are privies in blood, as the heir is to the ancestor; privies in representation, as is the executor or administrator to the deceased; privies in estate, as lessor and lessee, etc. \* \* \* But there can be no relation of privity between an heir of the deceased and the administrator of the deceased's estate."

In a note in 8 L. R. A. (N. S.), 212, is the following statement:

"The general doctrine of privity precludes the idea of such a relation between an executor or administrator of an estate and an heir, creditor, legatee, or devisee of such estate. While the executor or administrator is supposed to represent the estate, and, therefore, those interested in it, and he stands in privity with his testate or intestate, yet, because of this fact, it does not follow that he stands in privity with an heir, legatee, devisee, or creditor."

There being no privity between the parties, the judgment in the case of *Pickens v. Campbell* does not

bar the appellants from maintaining this action against the appellees who are in possession of the assets and unadministered property belonging to the estate of Jeanette Fensky, and against the appellee, J. H. Merriam, her administrator, into whose possession this property came, all of which property was derived through and from the separate estate of Ferdinand Fensky, and to which these appellants are entitled as heirs-at-law of said Jeanette Fensky, deceased. This would be true even though there had been no fraud in the estate of Ferdinand Fensky.

### **Succession to Property Under the Law of California.**

Ferdinand Fensky resided in Kansas for many years [Tr. pp. 621, 622, 267, 261, 319] and there acquired a large amount of property. [Tr. pp. 293-307, 320-326, 506, 507, 309, 261.] He removed to California and took up his residence here in the year 1902. [Tr. p. 621.]

There was no community property law in the state of Kansas, consequently all property acquired by Mr. Fensky in that state was his separate property.

Some of the California property owned by Mr. Fensky at the time of his death was purchased while he was a resident of Kansas [Tr. pp. 629-631] and the remainder was purchased by him within a few months after he took up his residence in California. [Tr. pp. 629-631.]

When he removed to the state of California, where a community property law was in force, the character

of his property was not thereby changed. It remained his separate property and upon his death such of the property as was subject to distribution under the laws of California devolved as provided by law for the descent of the separate property of a husband dying without issue.

Civil Code of California, Sec. 1386, Subds. 2 and 8.

Subdivision 2 of section 1386 reads as follows:

“If the decedent leaves no issue, the estate goes one-half to the surviving husband or wife, and the other half to the decedent’s father and mother in equal shares, and if either is dead the whole of said half goes to the other. If there is no father or mother, then one-half goes in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister by right of representation. If the decedent leaves no issue, nor husband nor wife, the estate must go to his father and mother in equal shares, or if either is dead, then to the other.”

All property acquired by the husband in the state of Kansas, either before or after marriage, is, by the law of that state, the separate property of the husband, and it does not lose its character as such when brought into California and invested here.

Estate of Burrows, 136 Cal. 113.

Where property has been acquired outside of a community law state by non-resident married persons, it will not become community property merely because



of the removal of the husband and wife to a community law state.

Estate of Burrows, 136 Cal. 113;  
Kraemer v. Kraemer, 52 Cal. 302;  
Estate of Niccolls, 164 Cal. 368;  
Estate of Higgins, 65 Cal. 407.

All of Ferdinand Fensky's property was his separate property and at his death was succeeded to as such in the manner provided by the laws of California.

Upon his death, one-half of the property went to his wife and the other half to his surviving brothers and sisters and to the descendants of deceased brothers and sisters by right of representation.

Civil Code of Cal., Sec. 1386, Subd. 2, *supra*.

The property having been the separate property of Ferdinand Fensky *at the time of his death*, all property wherever situated, to which Mrs. Fensky succeeded, and the proceeds thereof, which she held at the time of her death and which were subject to distribution under the laws of California, passed to the relatives of Ferdinand Fensky and not to the relatives of Jeanette Fensky.

Civil Code, Sec. 1386, Subd. 8.

This subdivision applies to and embraces all of the separate property of the husband to which the widow succeeded at his death.

Section 1386, Civil Code of California, subdivision 8 of this section at the time of the death of Jeanette Fensky (July 8, 1908) read and now reads as follows:

“8. If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one-half of such common property goes to the father and mother of such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation.

“If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation.” (Stats. 1907. p. 568.)

The "heirs" of a person are those whom the law appoints to succeed to his estate in case he dies without disposing of the same by will.

Hochstein v. Berghauser, 123 Cal. 681, 687.

At the death of Jeanette Fensky the surviving brothers and sisters of Ferdinand Fensky and the descendants of his deceased brothers and sisters by right of representation became and were the "heirs" of Jeanette Fensky.

Estate of Watts, 179 Cal. 20;

Estate of Hill, 179 Cal. 683.

There is no inherent or natural right of inheritance independent of our statute of succession. Section 1386 of the Civil Code affords the only means of ascertaining who are the "heirs" of the decedent. Those who inherit under subdivision 8 of section 1386 take as heirs of the decedent widow or widower, *not as heirs of the predeceased spouse*.

Estate of Watts, 179 Cal. 20.

In the absence of a will and issue the right to succeed to the property of a widow derived from her deceased spouse is regulated by subdivision 8 of section 1386 of the Civil Code.

Estate of Page (Page v. Bryson), 58 Cal. Dec.

448 (not yet published in official reports);

Estate of Davidson, 21 Cal. App. 118.

Succession to estates is purely a matter of statutory regulation, which cannot be changed by courts.

Estate of Nigro, 172 Cal. 477;

Estate of Kirby, 162 Cal. 91.

It is in evidence that Jeanette Fensky never at any time had any property of her own [Tr. pp. 311, 272, 277, 530], except possibly a small amount of money bequeathed to her by a former sweetheart. [Tr. p. 624.]

The commingling of a large amount of the separate funds of the husband with a comparatively trifling amount of the separate funds of the wife will not forfeit the separate estate. The wife in such case at most could only have a claim against the estate of the husband for her funds so commingled.

Estate of Cudworth, 133 Cal. 462.

The property retained its status as separate property even though its form or identity was changed.

The evidence shows that after Mr. Fensky's death, his widow collected and received from the Kansas estate of her deceased husband more than \$50,000, and all his California property. [Tr. pp. 461-505, 445, 308, 641.]

In this state property does not lose its character or status as separate property by a mere change in form or identity, or because of the substitution of other property in the usual manner of sale or exchange. The substituted property, and the interest, rights and profits therefrom, retain the character of the property from which they are derived.

Estate of Brady, 171 Cal. 1;

McClure v. Colyear, 80 Cal. 378.



It follows that all property possessed by Ferdinand Fensky at the time of his death, to which Jeanette Fensky succeeded, passed at her death to the surviving brothers and sisters of Ferdinand Fensky and to the issue of his deceased brothers and sisters, by right of representation. This is true as to the proceeds of all property left by Ferdinand Fensky and acquired from his separate estate by Jeanette Fensky, and as to all property in which such proceeds had been invested by her. In short, all property left by Jeanette Fensky at her death descended to her heirs, who, under subdivision 8 of section 1386 of the Civil Code, were the surviving brothers and sisters of Ferdinand Fensky and the descendants of his deceased brothers and sisters.

**The Deeds Signed by Jeanette Fensky Were Not  
Delivered to the Respective Grantees Named  
Therein, and Are Void.**

On September 18th, 1907, Mrs. Jeanette Fensky signed and acknowledged a number of deeds, without any consideration therefor, purporting to convey to certain of the appellees certain real property in Los Angeles county, California, described in the bill of complaint and in the amended complaint. [Tr. pp. 18-23, 191-194.] The grantees claim title to the property therein described by virtue of the said deeds. The evidence shows conclusively that none of the deeds were ever delivered, and therefor, no title passed thereby. This being true, the property described in the

deeds was a part of the estate of Jeanette Fensky at the time of her death, and the same has never been accounted for or distributed in the said estate.

From about 1905, until Mrs. Fensky's death in 1908, the defendant, Don Ferguson, bought and sold real estate for her. [Tr. p. 565.] Mr. Parmele at the time of the signing of the deeds in question was a clerk and notary in Mr. Ferguson's office. [Tr. p. 510.] Mr. Parmele prepared the deeds and went to Mrs. Fensky's house with Mr. Ferguson on the day the same were signed. [Tr. p. 510.]

Mr. Parmele testified that Mrs. Fensky signed the deeds and acknowledged them and that:

"She directed Mr. Ferguson to take the papers and keep them—to continue to have control and charge of the property, and at the time of her death to record the papers covering such properties as she might have at the time of her death. She directed him to sell the property, or handle it just as if the deeds had not been given; that any property she owned at the time of her death covered by the deeds, those deeds were to be recorded." [Tr. p. 511.]

Mr. Parmele further testified that one of the deeds signed and acknowledged on September 18th, 1907, purported to convey to the appellee, Alma J. Schmidt, lot five of the Lewis tract and that prior to Mrs. Fensky's death she sold and transferred this same lot to Chenoweth. [Tr. p. 511.] He further testified that at the time she signed the deeds she assigned two mortgages and that the assignments were placed with

the deeds. [Tr. p. 512.] One mortgage was paid before her death and on January 22nd, 1908, he took Mrs. Fensky's acknowledgment to the satisfaction of that mortgage. [Tr. p. 512.]

On cross-examination Mr. Parmele testified as follows [Tr. pp. 515, 516]:

"Q. Well, give her exact words just as near as you can approximately. I know you want to be fair. Just as near as you can, what she said.

"A. Well, I could give them in substance, and that is all I could do. She directed Mr. Ferguson to keep the deeds in escrow, and to record any covering the property which she might own at the time of her death.

"Q. Did she use those words, 'record any covering property she might own at her death?'

"A. That is my recollection of it, of the substance of it, at least; or to sell or dispose and manage the property.

\* \* \* \* \*

"Q. Did she say anything to him as to how he might dispose of any of the property prior to her death?

"A. Not further than to handle it the same as it was her property, the way he had been handling, selling, buying and trading property.

"Q. Did she use those words, that he could sell, buy and trade the property?

"A. Yes."

It is evident from the foregoing testimony that Mrs. Fensky did not make a delivery of the deeds, and the said deeds did not operate as a conveyance of the

property described therein. She told Mr. Parmele to deliver the deeds to Mr. Ferguson, and directed Mr. Ferguson to take them and keep them [Tr. p.<sup>511</sup> 514] and instructed him to continue the handling of her property in the same manner after the signing of the deeds as he had acted prior to that time, to sell, buy and trade the property and to sell any of the property described in the deeds that could be sold at a profit.

Shortly prior to September 18th, 1907, the day on which the deeds were made out and signed, Mr. Ferguson had a conversation with Mrs. Fensky concerning the deeds. Mr. Ferguson, in his deposition, testified concerning this conversation, that, "She spoke about making deeds to her people and that she wanted them all to have a home. She stated that I was to hold the deeds until her death." [Tr. p. 565.]

Mr. Ferguson testified regarding the conversation with Mrs. Fensky on the day the deeds were signed as follows: "I think it was at that time that she said she wanted to know that her people had a home and that if anything was sold, it would be replaced, or words to that effect. She said I was to hold the deeds until her death and then put them on record immediately."

"She told me if I got a chance to sell any of the property at a profit to do it, and that she would make it right, or words to that effect." [Tr. p.<sup>566</sup> 565.]

Mr. Ferguson further testified that after Mrs. Fensky signed the deeds a piece of property de-



scribed in one of the deeds was sold to a person named Chenoweth [Tr. p. 566], and that after Mrs. Fensky's death, he (Ferguson) recorded the other deeds but did not record the deed covering that property signed by her September 18th, 1907, purporting to convey to appellee Schmidt, this same property. [Tr. pp. 567, 572.] He also testified that at the time the deeds were signed, she assigned two mortgages that then stood in her name and that one of the mortgages was paid to her prior to her death. [Tr. p. 567.] (The other mortgage has never been accounted for in any way in her estate.) These instructions as testified to by Parmele and Ferguson completely destroy the claim of the appellees that there was a legal delivery of the deeds on the date upon which they were signed and acknowledged, or, in fact, that the deeds were ever delivered at all. Mrs. Fensky's instructions were that if the property was sold not to record the deed; this applied to each and every parcel described in the deeds.

In *Williams v. Kidd*, 170 Cal. 631, 637, it is said:

"It is equally well settled that where a deed is deposited with a third party to be handed to the grantee on the death of the grantor, unless this is accompanied by an intention on the part of the grantor that title to the property shall thereby *immediately pass* to the grantee, there is no delivery of the deed and consequently no title is transferred. *If the deed is handed to the depositary without any intention of presently transferring title, but, on the contrary, the grantor*

*intended to reserve the right of dominion over the deed and revoke or recall it, there is no effective delivery of the deed as a transfer of title."*

Kenney v. Parks, 125 Cal. 146, 57 Pac. 772;

Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep.  
Rep. 131;

Williams v. Kidd, 170 Cal. 631;

Bury v. Young, 98 Cal. 446.

The essential requisites to the validity of a deed placed in the hands of a third party, is, that it has passed beyond the control of the grantor for all time.

Wittenbrock v. Cass, 110 Cal. 1;

Dean v. Parker, 88 Cal. 284.

In Kenney v. Parks, 125 Cal. 146, 57 Pac. 772, it is said in reference to a delivery to a third person, that:

"The all-controlling fact in this case, which defeats plaintiff's claim, is that when the deeds were made and delivered to the cashier of the bank the respective grantors did not absolutely part with all future dominion and control over them,"

but that in the happening of some event, no title was to vest under the deed.

Can it be said that the deeds "presently became operative and effectual" when Mrs. Fensky expressly reserved the right to dispose of any of the property described in the deeds.

The fact that one deed was made at the same time as the others, but was never recorded, because the

property covered thereby was *sold* and conveyed prior to the death of Mrs. Fensky, is to be considered as a circumstance showing non-delivery of all of the deeds.

Williams v. Kidd, 170 Cal. 631, 645.

In the case of *Keys v. Meyers*, 147 Cal. 702, 704, the court in referring to and quoting from the case of *Bury v. Young*, 98 Cal. 446, 33 Pac. 388, said:

“The court, distinguishing the case from others of contrary import, says: ‘In every case where the deed has been declared invalid by reason of failure of delivery, it will be found that the grantor reserved some rights over the instrument; that he failed to part with all control and dominion over it; that upon the happening of some event, or contingency, or condition, he had the right, if so disposed, to reach out and take it from the possession of the depositary. \* \* \* The essential requisite to the validity of a deed transferred under circumstances as indicated in this case, is that when it is placed in the hands of a third party, it has passed beyond the control of the grantor for all time. That question is determined by the grantor’s intention in the matter, and his intention in making the delivery is a question of fact, to be solved by the light of all the circumstances surrounding the transaction.’ ”

It was contended by the appellees at the trial of this action that even though Mrs. Fensky retained dominion and control over the *property* described in the deeds, yet, that when the deeds were given to

Mr. Ferguson, that she thereby lost control of the *instrument*, and that fact would constitute a delivery.

That contention has no force, as is borne out by the authorities.

In *Stone v. Daily*, 58 Cal. Dec. 462, the court in answer to this same contention, made by the defendants in that case, on page 468, says:

“Counsel for defendant refer to the language of a number of cases such as *Bury v. Young*, 98 Cal. 446; *Kenny v. Parks*, 125 Cal. 146; *Keys v. Meyers*, 147 Cal. 702; *Moore v. Trott*, 162 Cal. 268, and *Long v. Ryan*, 166 Cal. 442, to the effect that, ‘The essential requisite to the validity of a deed transferred under circumstances as indicated in this case, is that when it is placed in the hands of the third party, it has passed beyond the control of the grantor for all time.’ But an examination of these cases shows at once that when they speak of the necessity of the control of the instrument passing from the grantor for all time, they mean control in the sense of power to recall it, control over it as an effective instrument of conveyance, not control in the sense of having the mere *physical* custody of it.”

In the case at bar the evidence shows that there was no “present passing of title,” and that Mrs. Fensky retained dominion over the deeds, as well as over the property.

Another claim made by the appellees is, that these deeds even if not delivered, would operate as a testamentary disposition, as to any of the property not



disposed of by Mrs. Fensky prior to her death. That this was the effect given to the transaction by the defendants claiming under the deeds is evidenced by a letter from appellee Farnsworth to Campbell in Kansas, written prior to the death of Mrs. Fensky, and after the signing of the deeds by her, in which Mrs. Farnsworth says that the disposition made by Mrs. Fensky of her property is, "*to take effect at her death*" [Tr. p. 449], and appellee Merriam also wrote to Campbell (*after* the death of Mrs. Fensky), saying, "Mrs. Fensky *thought* that she could make either a separate will or a separate transfer of every piece of property she had" (in the manner attempted), but that, "*her notion was erroneous.*" [Tr. p. 610.] It appears from the statement in his letter that appellee Merriam was familiar with the law on the subject.

It would scarcely seem to need the citation of authorities to controvert this claim that appellees are now making, "that a deed even if not delivered during the lifetime of the grantor would operate as a will" after the grantor's death.

We cite a few authorities as follows:

In *Hayden v. Collins*, 1 Cal. App. 259, the court said:

"Delivery with intent to pass title is essential to a valid conveyance of real property (*Black v. Sharkey*, 104 Cal. 280; *Kenney v. Parks*, 137 Cal. 531). Appellant admits that the deed was never delivered to him, but seems to rely on a delivery in escrow, but it is absolutely essential to the valid-

ity and effectiveness of a deed in escrow that it be delivered to a third person for the grantee, *beyond any power in the grantor to recall or revoke it*. The grantor must clearly and unequivocally evidence an intent and purpose to *part with the possession and control of the deed* for all time. In short, the delivery and transfer must be *irrevocable*. (*Bury v. Young*, 98 Cal. 446; *Kenny v. Parks*, 125 Cal. 146.) The deed was not to *take effect until after Mrs. Hayden's death*. This clearly shows that there could have been no such delivery as is requisite to the validity of any deed. If that deed was not effective as a conveyance during the life of the grantor, it could not become quick with life the moment she died. If delivery with intent to pass title was not accomplished in life, it certainly could not be accomplished after death. \* \* \* The law does not allow a testamentary disposition *by deed*." (Italics are the court's.)

*Williams v. Kidd*, 170 Cal. 631, 644;

*Walter v. Way*, 170 Ill. 96;

*Johnson v. Johnson*, 24 R. I. 571;

*Schlicher v. Keller*, 67 N. J. Eq. 635.

If the grantor retains power to regain possession of the deed, but dies without doing so, and the deed is delivered to the grantee in pursuance of the original directions accompanying its deposit, such delivery upon the grantor's death is *not* valid and is *not* effectual to pass title.

*Keyes v. Meyers*, 147 Cal. 702, 707.

In *Williams v. Kidd*, 170 Cal. 631, the court said:

“So, too, if it be the intention of the grantor when he deposits a deed that it shall only be delivered to the grantee by the depositary after the death of the grantor, and that title is to vest only upon such delivery after his death, then the deed is entirely inoperative as constituting an attempt by the grantor to make a testamentary disposition of his property. This may only be done by will executed as required by the law of wills of this state, and a deed, the purpose of which is intended to be testamentary, cannot be given effect.”

Mrs. Fensky's reservation of the right to *sell* the property, and her instruction *not to record the deeds covering such property as might be sold by her prior to her death*, show plainly that it was not her intention that title should “immediately pass to the grantees.” And the deeds were “entirely inoperative” as constituting a testamentary disposition of her property.

It is clear that Mrs. Fensky did not divest herself of her title, and therefore this property is a part of her estate, to which these complainants are entitled as heirs-at-law of said Jeanette Fensky, and this is true even outside the question of the property being impressed with a trust in their favor because of the fraud perpetrated upon them in obtaining the quitclaim deeds from them.

**A Donato Mortis Causa, Must During the Life of the Donor, Take Effect as an Executed and Complete Transfer of His Possession of the Thing and His Title Thereto.**

In *Basket v. Hassell*, 107 U. S. 602, the court in deciding what constituted "*gifts causa mortis*" passed upon the following indorsement:

"Pay to Martin Basket, of Henderson, Ky.; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself."

"H. M. Chaney."

The court said in reference thereto:

"While here, the condition annexed by the donor to his gift, is a condition precedent, which must happen before it becomes a gift, and, as the contingency contemplated is the donor's death, the gift cannot be executed in his lifetime, and, consequently, can never take effect."

In the case at bar the following is one of several writings all identical in form [Tr. pp. 608, 612], under which certain of the appellees claim, as "*gifts causa mortis*," to-wit:

"Mr. and Mrs. W. C. Stein: Oct. 10th, 1907.

Topeka, Kansas,

Dear Friends:

I have been sick all summer. *In case I should not get well—and pass on—I want the note of one thousand you owe me to be paid to my two sisters, Amanda Katzung, and Alma J. Schmidt.*" [Tr. p. 608.]



We think the foregoing quotation from the case of *Basket v. Hassell*, 107 U. S. 602, determines the status of these writings as not being valid gifts *causa mortis*, it appears that the same condition is here annexed, namely "*the donor's death*" before it was to be an executed gift. These are the letters upon which the administrator (appellee Merriam) based his right to omit the notes of Stein, Campbell and George Fensky, from his inventory.

As further authority on the subject we cite the case of *Noble v. Garden*, 146 Cal. 226, it was there held that where a person retained dominion and control during her lifetime over the property attempted to be given, and received, all income therefrom, there was no gift. The language of the decedent was, "If I should pass away, whatever is left from these certificates deliver to the people to whom they have been assigned." The court said:

"The title certainly did not vest in the parties to whom the assignments were made, because it was expressly stated that it should remain in deceased. If the title remained in deceased, the transaction shows only an intention to make a gift. By the terms, understanding, and intention of deceased, the gift was not to take effect until her death. In such case the disposition is testamentary and not a gift."

In *Hart v. Ketchum*, 121 Cal. 426, it is said:

"Unless the property in the thing given vests in the donee it remains in the donor, and there is only

a purpose of intention on his part to make a gift. Such purpose, or intention, is incapable of enforcement. The delivery must accompany the gift and must be made at the same time. It is the *delivery* by the *donor*, and not the *possession* by the *donee*, that makes the gift effective."

In *Knight v. Tripp*, 121 Cal. 674, 678, the court said:

"A written instrument may be available for designating the property intended to be given, as well as to show the intention of the donor, but by itself it no more establishes the gift than would the same words orally delivered by the donor. \* \* \* It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and complete gift."

In *Knight v. Tripp*, *supra*, it appears (p. 678) that the disposition of the property of the decedent was "limited to the *event of death*." The court said it was clear that the decedent did not intend "to make a present, irrevocable gift of the property."

In the instant case Mrs. Fensky undoubtedly limited her attempted disposition to the notes "to the event of death." She wrote in each instance, "In case I should not get well—and pass on—I want the note" to be paid to—(naming the alleged donee). [Tr. pp. 608, 651.]

There was not manifested any intention to give, and there was no delivery of the notes, either actual or symbolic. In the absence of delivery, there was not a gift *causa mortis*.

The evidence shows that the notes were not delivered to the respective alleged donees. The letters written by Mrs. Fensky in October, 1907, did not constitute a symbolic delivery of the notes and they did not constitute a delivery of the means by which the alleged donees could obtain possession of the notes. They were merely conditional orders upon the makers of the notes for the payment of the respective amounts due thereon, the condition being that they should be paid to the persons named in the respective letters "in case of the death" of Mrs. Fensky.

To complete a gift *causa mortis* and make it effective, it is necessary that there be a delivery to the donee, actual or symbolic, before the death of the donor. Where the gift was understood by the donee not to become effective or to confer any right of possession before the death of the donor, the gift is ineffective, and the property belongs to the estate of the donor.

Fite v. Perry, 8 Cal. App. 85.

Mrs. Farnsworth, on May 21, 1908, wrote to Campbell that Mrs. Fensky's disposition of her property by *deed* and etc., was "to take effect at her death. \* \* \* She has signed papers to that effect." [Tr. p. 449.] The evidence is that none of the alleged donees understood that the attempted gifts were to become effective or to confer the right of possession, before the death of Mrs. Fensky.

In 3 Pomeroy Equity Jurisprudence (4th Ed.), §1149, it is said:

“It is essential to the validity of a donation that the thing given to be delivered to the donee or to his use. Without a delivery the transaction would only amount to a promise to give, which being without consideration, would be a nullity. The intention to give must be accompanied by a delivery, and the delivery must be made with an intention to give.”

A gift *causa mortis* is not a testamentary act. If a person intends to make a testamentary gift, which for any reason is ineffectual, it cannot be supported as a donation *causa mortis*.

3 Pomeroy Eq. Jur., §1147;

Basket v. Hassell, 107 U. S. 602.

It is not the possession of the donee, but the delivery to him by the donor, which is material in a *donatio mortis causa*. An after acquired possession of the donee is nothing; and a previous and continuing possession, though by the authority of the donor, is no better.

Miller v. Jeffers, 4 Gratt. (Va.) 472.

If, by the terms of the written instrument as we find in the instant case, the gift is not to take effect until after the death of the donor, it is not a gift but an attempted testamentary disposition of the property. Such limitation is a condition precedent which prevents the gift from becoming absolute in the life-



time of the donor, and the subject of the gift becomes a portion of his estate at the time of his death.

The condition imposed by Mrs. Fensky upon her attempted gifts was, "In case I should not get well—and pass on." [Tr. p. 608, 651.] With this condition attached the title to the notes did not vest in the donees, but indicated only "an *intention* to make a gift," which intention "is incapable of enforcement." There was no delivery of the notes, either actual or constructive, and nothing to convert the revocable purpose into a complete gift.

**The Promissory Notes of Stein, Campbell, and George Fensky, Were a Part of the Estate of Jeanette Fensky at Her Death, and Were Omitted From the Inventory by J. H. Merriam, the Administrator of Her Estate.**

On Oct. 19, 1907, Mrs. Fensky signed several instruments of writing [Tr. p. 608] all of which were identical in *form* and which the appellee Merriam claims were an "attempt" on the part of Mrs. Fensky to make a gift *causa mortis* [Tr. pp. 612, 613] of the promissory notes described in the respective instruments, and therefore should be upheld as *valid* gifts *causa mortis*.

In order to constitute a valid gift *causa mortis*, as we have heretofore shown, there must be a delivery of the thing given. The evidence shows there was no delivery of the promissory notes to the purported donees.

One letter addressed to Mr. and Mrs. W. C. Stein, stating that in case Mrs. Fensky "*should not get well, and pass on*" she wanted "*the note of \$1000.00 you owe me to be paid to my two sisters.*" [Tr. p. 608.] Mr. Stein testified that he owed \$2400.00 on account of two notes, to *Mr. Fensky* at the time of his death, and thereafter changed the notes into *one note* in *Mrs. Fensky's* name and dated it *prior* to Fensky's death and later paid a part of the money to Mrs. Fensky and made a new note for \$600.00 to Mrs. Fensky, that was the last of the \$2400.00. [Tr. pp. 261, 262.] The note for \$600.00 was produced by Mr. Stein and was read in evidence. [Tr. p. 262.] It is dated January 15, 1908, more than three months after Mrs. Fensky had written the letter upon which the appellee Merriam claims to have acted in distributing the proceeds of a note of \$600.00, belonging to the estate of Jeanette Fensky. [Tr. pp. 262, 265.]

Clearly Mrs. Fensky's letter cannot be said to be an "attempt" to make a gift *causa mortis* of a note different in amount from that described in the letter long subsequently to the date of the purported gift.

As to the "attempted" gift of the Campbell note [Tr. p. 608] there was not a delivery, and without such delivery there was no gift.

Mrs. Fensky collected interest thereon until her death in July, 1908. Campbell wrote in his diary on May 6, 1908, that he sent Mrs. Fensky his check for one year's interest and on May 14, 1908, wrote in the same diary that he had received a receipt from Mrs. Fensky for the interest. [Tr. p. 458.]

The "statement" upon which appellee Merriam, administrator of the Jeanette Fensky estate, acted in distributing the Campbell note of \$1000, contained the same language as the "statement" addressed to Mr. and Mrs. Stein, to-wit: "In case I should not get well and pass on—I want the note of \$1000 you owe me to go to" \* \* \* Minnie Farnsworth and Corrine Loveland, etc. This statement was sent by Appellee Farnsworth to Mr. Campbell in Kansas, shortly after the death of Mrs. Fensky, thereby claiming title to the note. Mr. Campbell responded under date of July 15, 1908, saying:

"Just now received yours of 13" inst., inclosing statement signed by your aunt of 10" Oct., 1907, in regard to my note. Whether this statement constitutes a valid transfer of the note to you and Corrine Loveland, may be questioned, inasmuch as it provides for the transfer to take effect *after* her death. Can't you say *truthfully*, that she turned the note over to you—gave it to you—*before* her death? Does she say anything about this note in her will? If not, that fact would be consistent with her transfer of the note to you *before she died*. In which case there would be no question about it being *your* property and *not* a part of her *estate*.

"If you will send me the note and will knock off the interest since the 1st of June, 1908, I will send you \$200 and a new note for \$800 dated Aug. 1st, 1908, \* \* \* if I am sure that I will be protected by paying *you* instead of the *administrator* of the estate. \* \* \* If you have to depend on that statement *alone* for your title I am afraid it does not accomplish the purpose. So far as I am concerned

though, I am safe enough in paying it if it is delivered up to me whether I pay it all in money or part in money and part in new note." (Italics are Campbell's.) [Tr. p. 451.]

The above letter was referred to J. H. Merriam, the administrator of the estate [Tr. p. 453] (who was also acting as attorney for appellee Farnsworth in the matter of the estate). [Tr. p. 598.] Merriam answered the above letter on July 24, 1908, saying that Mrs. Fensky had the *erroneous notion* that she could make a disposition of her property in the manner attempted. Also mentions a note of George Fensky of \$200, due the estate of Mrs. Fensky, for which George was being held to *account* in some manner, but which note has never been *accounted* for in the estate by Merriam; also asking Campbell to "influence" the "Fensky heirs" to such a "course" so as to avoid a claim by them *in and to* the estate. [Tr. pp. 609-612.] And he further stated that the purported donees named in the statement had signified their willingness to accept the "proposition" contained in his letter, and had left the \$1000 note (owing to Jeanette Fensky at the time of her death) with him, and that upon the payment of \$200, and the receipt of two new notes payable to the purported donees, that he would cancel and return the former note. [Tr. p. 610.]

The next steps in the transaction are chronicled in "diary" entries by Campbell under date of Aug. 4, and 8th, 1908, telling of a contemplated trip to California and a plan to make a payment on his \$1000



note made to Mrs. Fensky, and the receipt of a draft from W. C. Stein, to be delivered to J. H. Merriam, in payment of *his* note to Mrs. Fensky. And that on the 8th of Aug., 1908, that he was in Pasadena in Merriam's office, where he took up his note made to Mrs. Fensky, and delivered the Stein draft to Merriam in payment of the Stein note to Mrs. Fensky. [Tr. p. 459.]

Appellee Merriam testified in regard to the above transactions [Tr. pp. 606, 607, 612, 613], and his testimony clearly shows that he knew these notes were a part of the estate of Jeanette Fensky, of which he was administrator, and for which notes he did not account. All of these notes were a part of the separate estate of Ferdinand Fensky, at the time of his death, or the proceeds thereof, and were also a part of the Jeanette Fensky estate, but were concealed by the appellees.

The \$2819.73 in the account of Jeanette Fensky at the time of her death [Tr. p. 598] was derived from the Rost mortgage (which had been illegally disposed of by appellee Farnsworth and Campbell, while Mrs. Fensky was too ill, to even "broach" the subject to her. [Tr. pp. 448, 458-459] and which money and mortgage were the result of the original *Ferdinand* Fensky contract of sale to Rost [Tr. p. 447] and which the appellees stipulated belonged to him in his own right. [Tr. p. 506.]

Out of the above sum J. H. Merriam was paid a retainer fee [Tr. p. 598] (unaccounted for in the

estate) [Tr. p. 613], and the *balance* included in the estate.

**Knowledge on the Part of the Administrator, J. H. Merriam, of the Property Belonging to the Estate of Jeanette Fensky, and Omitted From His Inventory and Accounts.**

Jeanette Fensky died July 9th, 1908, in Los Angeles county [Tr. p. 625], leaving an estate consisting of cash in one bank amounting to \$2,819.73 [Tr. pp. 259, 598]; \$800.00 in another bank [Tr. p. 548]; the real estate described in the bill of complaint herein [Tr. pp. 18-20]; note of M. T. Campbell for \$1,000.00 [Tr. pp. 458, 459, 607]; note of W. C. Stein for \$600.00 [Tr. p. 262]; note of George Fensky for \$200.00 [Tr. p. 611]; note of Don Ferguson for \$1,050.00 [Tr. p. 578]; and a claim against Mrs. Katzung for \$135.00 [Tr. p. 578]; all of the same being the property or the proceeds of property which belonged to the separate estate of her deceased husband, Ferdinand Fensky. Two parcels of real property that were a part of her estate were the identical parcels that had been received by her from her said husband's estate [Tr. pp. 527, 528], and which she attempted to convey to certain of the defendants herein, by deeds which were never delivered.

Mrs. Fensky left a brother and two sisters, the defendants Wellke, Katzung and Schmidt. Upon their petition [Tr. p. 644], the defendant J. H. Merriam was, *on August 1, 1908* [Tr. p. 122], by the Superior

Court of Los Angeles county, appointed administrator of the estate of Jeanette Fensky, deceased.

That on *Sept. 8, 1909*, said Merriam filed an inventory in said estate, alleging that the total assets of said estate was the sum of \$3,509.38, consisting of \$2,324.38 as money a claim against the defendant Katzung for \$135.00, and a note of Don Ferguson for \$1,050.00, and alleged that the sole heirs at law of the said Jeanette Fensky were defendants Wellke, Katzung and Schmidt. [Tr. pp. 576-578, 655.] He purposely omitted from said inventory the real property belonging to the said Jeanette Fensky and described in the complaint, the Campbell, Stein and George Fensky notes, \$800.00 in the bank and \$125.00 cash, and the same were never accounted for in any manner by the said defendant Merriam in the said estate, and the same are unadministered assets of said estate which the appellants claim as heirs at law of Jeanette Fensky and Ferdinand Fensky, deceased.

That at the time of filing his final account [Tr. p. 653] the said defendant Merriam was fully advised of the real estate belonging to said Jeanette Fensky at the time of her death and had full knowledge of the rights of the complainants herein, and knew that the defendants Wellke, Katzung and Schmidt had no interest whatsoever in said property, and knew that the said deeds had not been delivered to the respective grantees named therein. That since the filing of said final account and the distribution of the assets of the estate as contained in the inventory, the said Merriam

had been requested by complainants to further administer on said estate, but has failed, refused and neglected so to do.

J. H. Merriam, while pretending to act as administrator of the estate of Jeanette Fensky, was employed by and acted as the attorney and agent of the defendants Wellke, Katzung, Schmidt and Farnsworth, with the purpose and design of preventing the appellants from securing their just shares of the estate of their deceased brother and of Jeanette Fensky, deceased, and, instead of taking possession and control of all property belonging to the estate, aided and abetted the said defendants in obtaining and in retaining property to which he knew they had no lawful right. Defendant Merriam, although fully advised that Mrs. Fensky's deeds to the other defendants had not been delivered and that the real property in question belonged to the estate, not only made no effort to take control of the same, but, when the suggestion was made that it be turned in as part of the estate, he advised against such a course, and knowingly, purposely and fraudulently concealed the fact that said real estate belonged to the estate of said decedent.

Under the statutes of California, all of the estate of Jeanette Fensky, both real and personal, passed into the possession and control of Mr. Merriam, as administrator.

Civil Code of California, Sec. 1384.

It was his duty as such administrator to take charge of any estate, either real or personal, belonging to



her at the time of her death, yet he neither took nor claimed possession of it, but permitted it to pass into the hands of other appellees by whom he had been employed. [Tr. p. 612.]

H. H. Schmidt, son and representative of appellee Katzung in the matter of the Jeanette Fensky estate, testified as did others, that the defendants had many, many conferences in the office of J. H. Merriam in regard to the estate. [Tr. p. 531.]

Mr. Thompson, the representative of the defendant Katzung [Tr. p. 543] testified as follows: "My understanding is that Mr. Merriam expressed a doubt as to the validity of those deeds; that they had not been properly delivered." [Tr. p. 545.] "Q. You said that Mr. Merriam at one of these interviews expressed doubt as to the validity of the deeds? A. There is no question about that. Q. He did so express himself? A. He did, not to me particularly,—in a general way. Q. Did he state the reason for the invalidity? A. That they were not properly delivered." [Tr. pp. 553, 554.]

"Q. The discussion of the invalidity of the deeds occurred how long after Mrs. Fensky's death? I am referring to the discussions at Mr. Merriam's office. A. Well, my understanding, you know, was general, right away to begin with." [Tr. p. 559.]

He also testified that within a short time after Mrs. Fensky's death "it was suggested by Mr. Merriam that this property be pooled and held by us and the deeds set aside," and the reason given by Mr. Merriam

for such advice was "that the deeds were not valid." But that he (Thompson) would not submit to having the property put in the inventory. [Tr. pp. 547-548.]

He also testified as follows:

"We were paying a lawyer five hundred dollars (\$500) to inform him of his duty. Q. What lawyer did you pay that to? A. Mr. Merriam." [Tr. p. 561.] He further testified that he had been advised by other counsel, that the deeds were not valid. [Tr. pp. 547, 556.] See also the evidence of Mr. Schmidt [Tr. pp. 531-542] which is most convincing of the fact that Merriam knew of the invalidity of the deeds and advised concealment of the property to deceive the appellants and their co-heirs.

The witness, Henry M. Schmidt, who is the son of the appellee, Alma J. Schmidt, and acted as her representative in the matter [Tr. p. 542], referred in his testimony to the *many* conferences at Mr. Merriam's office, in which the delivery of the deeds were discussed. [Tr. p. 531.] He testified that he and the others "were afraid of the other side (Fensky heirs) attacking the estate," and that they had decided to "leave the deeds stand the way they were." [Tr. p. 533.]

Schmidt further testified that he remembered distinctly that they, at these conferences, discussed the validity of the deeds and the "chance of a contest" [Tr. p. 534]; also that "Judge Meriram advised us as to the matter and also helped in the discussion," and "we were afraid of the other parties coming in and attacking them" (the deeds) and that they dis-

cussed putting the property in the inventory of Mrs. Fensky's estate, that was covered by the deeds. [Tr. p. 537.]

Schmidt also testified [Tr. p. 536]:

“Q. Now, Mr. Schmidt, you stated a while ago concerning this discussion regarding the possibility of a contest with the Fensky heirs that Judge Merriam gave you some advice that helped you considerably. What did he advise you about?

A. Well, one main point of his advice was not to wrangle amongst ourselves, and he satisfied with what we got, and leave the deeds stand the way they were and leave the property stand that way; and also, if we didn't, it might leave the other side (Fensky heirs) a channel to come in and attack us if we got to fighting amongst ourselves.” “And it seemed like we were all scared that something would happen about the property.” [Tr. p. 536.]

Schmidt also testified concerning the discussion as to whether the property described in Mrs. Fensky's deeds should be put into the inventory in the Jeanette Fensky estate, as follows:

“Q. Who suggested that it be omitted from the inventory?

A. Well, I guess we all did; that it was best not to put it in.”

“Q. Well, what advice did Mr. Merriam give you about the inventory?

A. Well, after we discussed it pro and con, we all agreed to let it stand the way it was, thinking it best for all concerned, to leave the deeds stand the way they were.” [Tr. p. 538.]

He further testified that appellee Katzung transferred within a few days after Mrs. Fensky's death, all the property she was claiming under the void deeds, to him and his brother, and they later conveyed it back to her, this he said was done to keep the other side (Fensky heirs) from attacking it. And that the other defendants had done likewise with the rest of the property. [Tr. pp. 540, 541.]

Appellee Merriam in the course of his testimony admitted that in 1910 he had testified, at the request of the court, in action between certain of the defendants herein, in reference to the deeds signed by Jeanette Fensky, as follows: in answer to a question as to whether he had suggested including all the property in the probate proceedings, he said that he did not remember having done so, but, that "It came up the question of the validity of the deeds and whether they should be contested in any way." He also said he never thought of questioning the validity of the deeds himself, "except I thought the *heirs of Mr. Fensky* might do it." [Tr. p. 616.]

On July 24, 1908, Mr. Merriam wrote a letter to M. T. Campbell in answer to a letter his client appellee Farnsworth [Tr. p. 598] had received from Campbell, wherein Campbell told her that her claim to his note, *as opposed to the estate*, might be questioned. Appellee Merriam in answer to that declaration, said: "Mrs. Fensky thought she could make a separate will or a separate transfer for every piece of property she had," but her notion was "erroneous." And in refer-



ence to the *Fensky* heirs, he stated: "Many of whom, as I am informed, live in your city, and I thought you might perhaps have an opportunity to influence them to such a course as would avoid litigation." [Tr. pp. 611, 612.]

Mr. Merriam also testified that he had been employed by the relatives of Mrs. Fensky, prior to the writing of that letter. [Tr. p. 612.] Also that the retainer fee paid to him by appellee Farnsworth out of the estate money [Tr. p. 598], was not accounted for by him in his accounts in the estate. [Tr. p. 613.] He further testified that he advised them (the defendants) to carry out what the effort of Mrs. Fensky was to dispose of her property "in the way that this was done" [Tr. p. 619], and he testified, "My recollection is that the heirs (pretended heirs) discussed all those things and *agreed among themselves* that they would raise no technical questions about those things that she had *attempted* to do to dispose of her property—to leave it as she left it, or attempted to." [Tr. p. 613.] And relative to the notes belonging to Mrs. Fensky, he said, "that they were an attempt to make a gift *causa mortis*, and that we decided that that was the intention, and that it should be carried out." [Tr. p. 607.] *He* and *Campbell* decided that question. He receipted for the *Stein* note, owing to the estate as "*Atty. Holder*" [Tr. p. 262], and turned the proceeds over to certain of the defendants.

Appellee Farnsworth, daughter of appellee Welke, testified that she attended the meetings in appellee Mer-

riam's office in regard to Mrs. Fensky's estate [Tr. p. 598] and that the "first question of validity (of the deeds) was raised in regard to the other side—the Fensky heirs." [Tr. p. 681.]

She further testified that: "Mr. Thompson told me that he had seen an attorney, \* \* \* and that the attorney had told him that he considered that these deeds were not delivered." [Tr. p. 626.] And also that on July 23, 1908, she and her father deeded all of the property that they were claiming under these deeds to each other, and the next day executed deeds, conveying the property back to the original holders. [Tr. p. 625.] In answer to a question, if that had not been done because they were fearing a contest from the *Fensky heirs*, she avoided the question, and eventually said, "Perhaps so." [Tr. p. 626.] In this case she testified that she was present when the directions were given to Mr. Parmele and Mr. Ferguson by Mrs. Fensky in regard to the handling of the property after the deeds were signed; but was forced to admit in the course of her testimony that she had testified in another action in 1910 in reference to the same occasion, upon being questioned by Mr. Merriam as follows:

"Q. By Mr. Merriam: Were you present when the deeds were executed in the afternoon?

A. I was not in the same room. My room was adjoining, and I was in the hall and in my room part of the time.

Q. Did you hear any part of the conversation at that time or knew of any of the executions of the deeds?

A. I heard *part* of the conversation, but I didn't consider it important for me to be right there in the room." [Tr. p. 628.]

It seems that the defendant Farnsworth had peculiarly intimate knowledge of the fraud and frauds perpetrated upon the appellants and the heirs of Ferdinand Fensky; she acted as private secretary to Jeanette Fensky during all the negotiations had with Campbell, in procuring the releases and quitclaims from them [Tr. p. 624]; and in the Jeanette Fensky estate, there was a repetition of the frauds.

The evidence shows that appellee Merriam was advised by Mr. Ferguson as to the manner of the signing and the handling of the deeds signed by Mrs. Fensky on Sept. 18, 1907, covering the real property of her estate [Tr. pp. 567, 568, 570, 571]; and that the matter was discussed with the defendants in Merriam's office. [Tr. pp. 567. 571.]

The property belonging to the estate of Jeanette Fensky, and which was fraudulently omitted from the administrator's accounts is as follows:

Twelve parcels of real property in the cities of Los Angeles and Pasadena, described in the bill of complaint [Tr. pp. 18-20], and one tract in San Bernardino county, described in the amended complaint [Tr. p. 193], all covered by the deeds signed by Mrs. Fensky on September 18, 1907. [Tr. pp. 510-513.] Note of M. T. Campbell [Tr. pp. 458, 459, 607]; note of W. C. Stein [Tr. pp. 262, 459, 607]; note of George Fensky [Tr. pp. 611, 612]; cash paid to J. H. Merriam

[Tr. pp. 598, 613]; cash in bank [Tr. pp. 257, 548, 549]; Webster mortgage [Tr. pp. 512, 567].

Mr. Wm. Thompson testified that there were several parcels of real estate that Mrs. Fensky was buying on contract, which are unaccounted for in her estate. A total of \$3509.38 was inventoried by the administrator [Tr. p. 578], and in his final account he charges himself only with the said sum of \$3509.38. [Tr. p. 653.]

Appellee Merriam was appointed administrator of the estate of Jeanette Fensky on August 1, 1908. For some time after his appointment he took no steps whatever looking to the administration of the estate, but on September 8, 1909, he filed a pretended inventory, showing the above total of property, and upon the coming in of said inventory filed a purported final account in which he represented that property of the intestate in Kansas had been wholly administered and distributed. That administration was not closed until the 21st day of December, 1914. [Tr. p. 318.] And further represented that the said Jeanette Fensky left as her sole heirs-at-law the defendants Wellke, Katzung and Schmidt. [Tr. p. 655.]

**Equity Will Declare Those Holding Property That  
Rightfully Belongs to Another, a Trustee for  
the Thing Gained.**

All of the estate left by Ferdinand Fensky was property or the proceeds of property acquired by him in the state of Kansas while he was a resident of that



state and where he was a resident until his removal to California in 1902. [Tr. p. 621.] Jeanette Fensky had no property of her own. [Tr. pp. 272, 277, 530.] Upon the death of Ferdinand Fensky's widow, Jeanette Fensky, the property acquired by her from her deceased husband's separate estate vested in the surviving brothers and sisters of Ferdinand Fensky and the descendants of his deceased brothers and sisters, and not in the brothers and sisters of Jeanette Fensky. (Civil Code, sec. 1386, subd. 8, *supra*.)

That one who acquires land or other property by fraud or mistake, or under any circumstances as would render it inequitable for him to retain it, is in equity regarded as a trustee of the party who suffers by reason of the fraud or other wrong, and who is in equity entitled to the property, is so well settled as to scarcely warrant discussion here. However, we will briefly touch upon this matter and cite a few of the leading cases on the subject.

This principle is recognized by the law of the state of California in the form of a code section, to-wit: Section 2224 of the Civil Code, which reads as follows:

"One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

In all cases of this character a constructive trust will be impressed upon the property so acquired in

favor of the person equitably entitled thereto. This will obtain although he may never have had any legal estate in the property.

A leading case on this question is that of *Bacon v. Bacon*, reported in 160th Cal. at page 150. This action arose through a mistake in the reading and probating a will, in which the word "ten" was, through mistake, read as "two," and by reason of the mistake certain legatees named in the will received \$2000 each instead of \$10,000, the amount intended to be inserted by the testator, and the suit was brought to obtain a judgment for the unpaid balance of \$8000 with interest; the action being brought some three years after the distribution of the estate. Judgment was rendered for the plaintiffs, from which the defendants appealed. The Supreme Court sustained the decision of the trial court, and in a well considered decision held that the Superior Court had jurisdiction of the action and power to review the decree of distribution and to declare that the defendants held as involuntary trustees of the plaintiff the property obtained by them through the decree of distribution. In rendering its opinion, the court followed its decision in the case of *Sohler v. Sohler*, 135 Cal. 323. Other cases so holding are:

*Wingerter v. Wingerter*, 71 Cal. 105;

*Sanford v. Sanford*, 139 U. S. 645, and

*Estate of Walker*, 160 Cal. 549.

The facts in this latter case were as follows: William Walker, a resident of the county of Santa Cruz,

died supposedly intestate, and letters of administration were issued, administration upon the estate was duly made and the decree of final distribution was made and entered, and the property delivered to the distributees and the administrator discharged. More than eight months thereafter one Frank D. Enor filed an alleged will of the deceased and petition for its probate. The distributees contested and in their contest set up the facts above related. A demurrer to the contest was sustained and the will ordered omitted to probate. The distributees appealed from this order.

The Supreme Court sustained the order of the trial court, and a portion of its opinion reads as follows:

“Respondent’s position is that neither the order admitting the will to probate, nor the effect of that order, is in any wise an attack, direct or collateral, upon the decree of distribution; that if through accident, fraud or mistake, the distributees are holding property under the decree, to which they are not entitled, equity will do justice, not by overthrowing the decree of distribution, but by declaring the distributees to be involuntary trustees of the rightful owners of the property. This principle is, of course, well established. (Civ. Code, Sec. 2224; *State v. McGlynn*, 20 Cal. 233 (81 Am. Dec. 118); *Wingerter v. Wingerter*, 71 Cal. 105 (11 Pac. 853); *Mulcahey v. Dow*, 131 Cal. 73 (63 Pac. 158); *Sohler v. Sohler*, 135 Cal. 323 (87 Am. St. Rep. 98, 67 Pac. 282); *Parsons v. Weis*, 144 Cal. 419 (77 Pac. 1007); *Bacon v. Bacon*, 150 Cal. 481 (89 Pac. 317); *Insurance Co.*

v. Hodgson, 7 Cranch, 332 (3 L. Ed. 362); Case of Broderick's Will, 21 Wall, 503 (22 L. Ed. 599).)"

See also:

Estate of Hudson, 63 Cal. 457.

The principle we contend for here is well stated in Pomeroy's Eq. Jurisprudence at page 155, in which the author says:

"If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscionable manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

In Pomeroy's Eq. Jur. 919, it is said:

"Where a probate is obtained by fraud, equity may declare the executor or the other person deriving title under it a trustee for the party defrauded."

In the Estate of Walker (Cal.), 117 Pac. 511, Chief Justice Beatty in his concurring opinion said:

"But if it turns out that there was a will which was suppressed by an heir for the purpose of defrauding devisees or legatees, or, as in this case, lost and undiscovered until after distribution, the remedy of the devisee or legatee against



the heir who has received what was his is in equity to charge the heir as his trustee, and to require him to account and to transfer what he has acquired through the fraud, accident, or mistake.”

In this connection we would call the attention of the court to the fact that the evidence specifically shows that at least two pieces of the real estate belonging to Ferdinand Fensky at the time of his death remained in the hands of the widow, Jeanette Fensky, at the time of her death, although she attempted to convey it to the defendant Amanda Katzung by deed which was never delivered. And also that the balance of the said real estate and other property was acquired by her by the use of the money obtained from the estate of her said deceased husband. Under the circumstances of this case it must be held that all the property in the hands of Jeanette Fensky at the time of her death was impressed with a trust in her hands for the benefit of these complainants, and the character of this trust could not be changed by investing the funds in other property and taking title thereto in the name of another.

See:

McClune v. Collyear, 80 Cal. 378.

See also Pomeroy's Eq. Jur., Sec. 918 *et seq.*, 2nd Ed., in which he says:

“The remedy which equity gives to the defrauded person is most extensive. It reaches all those who, were actually concerned in the fraud,

all who directly and knowingly participated in its fruits, and all those who derive title from them voluntarily or with notice. A court of equity will wrest property fraudulently acquired not only from the perpetrators of the fraud, but, to use Lord Cottenham's language, 'from his children and his childrens' children,' or, as elsewhere said, from any persons amongst whom he may have parceled out the fruits of his fraud. There is one limitation: if the property which was acquired by fraud has come by transfer into the hands of a *bona fide* purchaser for a valuable consideration and without notice, even though his immediate grantor or assignor was the fraudulent party himself, the hands of the court are stayed and the remedy of the defrauded party, with respect to the property itself is gone; his only relief must be personal against those who committed the fraud."

In the case at bar the only claim made by the defendants to the property obtained from the estate of Jeanette Fensky is that they are next of kin of the said Jeanette Fensky and by virtue of the undelivered deeds. There is no superior equity nor any equity at all in favor of these defendants as against the plaintiffs, hence no such limitation as that mentioned above exists in this case.

As to the defendant J. H. Merriam, the administrator of the estate of Jeanette Fensky, under the California statutes, all of her estate passed into his possession and control, and it was his duty as such administrator to take charge of any estate, either real or personal, belonging to her at the time of her death.

He knew of the condition and circumstances of the deeding of the property to the defendants, and yet he neither took or claimed possession of it.

We submit that under these facts as proven by this record there can be no question but that plaintiffs are entitled to the relief prayed for.

It is proven that all the property belonging to the estate of Ferdinand Fensky was his separate property, such being the fact, then under the laws of the state of California in effect now and at the time of the death of Jeanette Fensky governing the distribution of estates of decedents, these complainants, and not the defendants Katzung, Wellke and Schmidt, nor any other of the defendants, were the heirs of Ferdinand Fensky and the said defendants were not entitled to any part of the estate of Jeanette Fensky.

See section 1386, Civil Code of California, subdivision 8 of this section, *supra*.

It is clear that under the second paragraph of this subdivision above cited, Ferdinand Fensky having died without issue, and all his property at the time of his death being his separate property, that the same on the death of Jeanette Fensky would go to his heirs and not to the next of kin of Jeanette Fensky. This would be true, even though the property, or any part thereof, obtained by Jeanette Fensky from the estate of Ferdinand Fensky had not been procured through the fraud perpetrated upon the complainants.

Furthermore, the property claimed to be owned by defendants through the deeds signed by Jeanette Fensky

but not delivered during her lifetime, belongs to the estate of Jeanette Fensky, for it is unquestionably the law universally laid down by all courts, that a deed signed by a person but not delivered during his lifetime vests no estate or interest in the property therein described in the grantee named therein, but that it is void.

The property described in these undelivered deeds having been obtained by Jeanette Fensky from the proceeds of the estate of her deceased husband, the same being his separate property, passed under the section of the California code above quoted, to the heirs of Ferdinand Fensky, including these complainants.

We do not see how it can be questioned that under the facts alleged in the bill of complaint and proven in this case, states a complete cause of action for an accounting against the defendants, and that the complainants are entitled to the relief prayed for.

**The Purported Decree of Distribution in the Estate of Jeanette Fensky Is Void Because the Statutory Notice of the Hearing of the Final Account and Petition for Distribution Was Not Given.**

Where, by reason of a defect in the procedure attending the giving of such constructive notice as is required by law to be given in order to vest jurisdiction in the court, the parties did not receive such constructive notice, all subsequent action of the court



based thereon is subject to attack, either in the same proceeding or in a later equitable action.

In the matter of the estate of Jeanette Fensky the first and final account, report and petition for distribution of the appellee, J. H. Merriam, as administrator with the will annexed [Tr. p. 653], was filed September 8th, 1909. [Tr. p. 656.] By the endorsement appearing upon the said petition, it appears that the clerk set the hearing of the same for September 22nd, 1909. [Tr. p. 657.] The notice given and posted by the clerk of the settlement of the final account and hearing of petition for distribution recited that "the 22nd day of *July*, 1909, has been appointed as the day for the settlement," etc., instead of the 22nd day of *September*, 1909. [Tr. p. 661.]

Admittedly, the notice referred to was void for the reason that the date specified therein for the hearing was prior to the filing of the petition and prior to the posting of the notice.

On the 22nd day of September, 1909, the final account and petition for distribution came on for hearing and the court thereupon entered a purported "order settling final account and petition for distribution." [Tr. p. 663.] By reason of the fact that no valid notice of the hearing of the final account and petition for distribution had been given by the clerk, the court did not acquire jurisdiction to make an order settling the final account and for distribution, and the same of necessity is void unless, as contended by the appellees, the same can be sustained by reason of other

purported proceedings taking place in the matter of the said estate. Clearly the position of the appellees is not tenable,—the other purported proceedings do not tend at all to sustain the order settling the final account and the order for distribution.

The powers of the Superior Court in the administration and distribution of estates are limited and special, and are purely statutory. The court is circumscribed by the provisions of the statute, and may not proceed in a manner essentially different from that provided by law.

Smith v. Westerfield, 88 Cal. 374;  
Estate of Strong, 119 Cal. 663, 667;  
Reither v. Murdock, 135 Cal. 197, 201;  
Estate of Dolbeer, 153 Cal. 652, 657;  
Curtis v. Schell, 129 Cal. 208, 220;  
Clark v. Superior Court, 20 Cal. App. 305, 309.

Whenever the acts of the court are shown to have been in excess of the power conferred upon it, or without the limits of its special jurisdiction, such acts are nugatory and are not binding upon anyone, not even upon one who has invoked its authority or submitted to its decision.

On September 11th, 1909 [Tr. p. 662], *after filing* his final account and petition for distribution, but *before the hearing* of the same, the appellee, Merriam, filed a so-called “supplemental petition for distribution.” [Tr. p. 657.]

The matter of settling the final account of an executor or administrator does not necessarily involve the matter of the distribution of the estate.

In fact, the only manner in which the court can acquire jurisdiction to settle the *final account* and make *distribution* at one and the same hearing is pursuant to section 1634 of the Code of Civil Procedure, and if the notice is not given as required by that section, the court cannot act.

Sections 1633 and 1634 of the Code of Civil Procedure are as follows:

“1633. When any account is rendered for settlement, the clerk of the court must appoint a day for the settlement thereof, and thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. If, upon the final hearing at the time of settlement, the court, or a judge thereof, should deem the notice insufficient from any cause, he may order such further notice to be given as may seem to him proper.

“1634. If the account mentioned in the preceding section be for a final settlement, and a petition for the final distribution of the estate be filed with said account, the notice of settlement must state those facts, which notice must be given by posting or publication for at least ten days prior to the day of settlement. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had without further notice or proceedings.”

The provisions of section 1634 apply only when the petition for distribution is filed “*with*” the final account

and *not* when it is filed *after* the filing of the final account.

In *Estate of Sheid*, 122 Cal. 531, the court had under consideration a decree of distribution made upon a petition filed *after* the filing of the final account but *before* the settlement of the same. There the court said:

“But whatever the reason may be, we find no authority for filing a petition for distribution at any time prior to the settlement of the final account unless it is filed ‘with’ it. This is a special proceeding, based upon the statute, and involving title to property, both real and personal, and in which the jurisdiction of the court can be acquired only by the observance of its provisions.”

On the same point see:

Coursen’s Estate, 6 Cal. Unrep. 756, 65 Pac. 965.

Section 1665 of the Code of Civil Procedure provides:

“*Upon* the final settlement of the accounts of the executor or administrator, or *at any subsequent time*, \* \* \* the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto.”

A decree of distribution cannot be made until after the final account of the administrator has been settled.

Code of Civil Procedure, Sec. 1665 (*supra*);

Estate of Spreckels, 165 Cal. 597, 606;

Smith v. Westerfield, 88 Cal. 374.



The final account of the appellee, Merriam, as administrator with the will annexed of the estate of Jeanette Fensky, has never been settled. The purported order settling the final account and for distribution [Tr. p. 663] is void by reason of the fact that no notice of the hearing thereof was given. The notice given by the clerk [Tr. p. 661] that the hearing of the final account was set for *July 22* was a nullity. The paper denominated, "supplemental petition for distribution" [Tr. p. 657] did not contain any report or account of the administrator, so that even if a notice of the hearing of the "supplemental petition" had been given, the same would not have operated as a notice of the hearing of the final account.

Section 1638 of the Code of Civil Procedure reads as follows:

"The account must not be allowed by the court until it is first proved that notice has been given as required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact."

It is the duty of the Probate Court to require proof and to determine that notice of hearing has been given as provided by law before it has power to settle an account or to order distribution.

Code of Civil Procedure, Sec. 1638 (*supra*);  
McClellan v. Downey, 63 Cal. 520.

Unless notice of the day on which the settlement of an account of an administrator is to be heard is given as prescribed by sections 1633 and 1634 of the Code

of Civil Procedure, there cannot be a valid settlement of the account.

Estate of Spanier, 120 Cal. 689, 701.

The decree [Tr. p. 663] does not recite and the record does not show that it was proved to the court that any notice was given. Without either a finding by the court or an affirmative showing in the record, we cannot presume that notice was given.

In *Bekett v. Selover*, 7 Cal. 233, the affidavit under consideration stated that notices had been posted in three "*different places*" instead of in three "*public places*" as required by statute. The statute provided that "an entry in the minutes of the court, that proof was made that notice had been given according to law, shall be conclusive evidence of the fact of such notice." The entry in the minutes was that "on due proof of posting notice of the time and place of hearing having been made," etc. It was held that this was not a compliance with the statute; that it was not in the language of the statute, or substantially the same in meaning; that it was confined to "due proof of posting notice of the *time* and *place* of hearing," while the statute required the notices to state the "name of the deceased, the name of the applicant, and the term of court at which the application will be heard."

The proceedings are special, and no intendments can be made in favor of the jurisdiction. Everything bearing upon that question must appear affirmatively.

McDonald v. Katz, 31 Cal. 167.

In *Hasting v. Cunningham*, 39 Cal. 142, the court said:

“Every intendment may be indulged in favor of the validity of the proceedings not inconsistent with the record. This is a rule of evidence, by the light of which we are to interpret the record, but it is not a rule which authorizes us to dispense with a substantial compliance with all the conditions of the statute. Read by the light of this rule, *the record must show* such a compliance.”

In *Pioneer Land Co. v. Maddux*, 109 Cal. 634, and *Pearson v. Pearson*, 46 Cal. 610, it is held that the presumptions that are implied to support a judgment arise only when the record is silent as to the jurisdictional facts, and that when the record states what was done, it will not be presumed something different was done.

In the *Jeanette Fensky* estate the decree did not recite or show that proof was made of proper posting of the notice of hearing, as required by section 1638 of the Code of Civil Procedure. [Tr. p. 663.] The only evidence of the posting of any notice whatever is the affidavit of posting the *void* notice of the hearing of the final account and petition for distribution. [Tr. p. 661.] *No proof of the posting of any other notice can be presumed.*

In the *Matter of Tracey*, 136 Cal. 385, it is said:

“In all cases where constructive service of notice is allowed to parties in interest who have no actual notice and who do not appear and subject

themselves to the jurisdiction of the court, the mode of service prescribed by the statute must be strictly pursued."

Statutes which dispense with actual personal service of process, and provide for a method less certain and satisfactory, must be strictly pursued.

Pollard v. Wegener, 13 Wis. 636.

Where service was made by publication and the judgment roll does not contain an affidavit that summons was in fact published, the judgment is void.

People v. Greene, 74 Cal. 406;

Hyde v. Redding, 74 Cal. 493.

In the case of Forbes v. Hyde, 31 Cal. 343, 355, it was held that where, because of a total absence from the record of any legal evidence tending to prove an essential jurisdictional fact, the order for publication of a summons and the publication in pursuance of such order were void, the court failed to acquire jurisdiction of the person of the defendant against whom publication was directed.

If it appears by the record, or otherwise, that the court did not acquire jurisdiction, the judgment will be pronounced a nullity whether it comes directly or collaterally in issue.

McMinn v. Whelan, 27 Cal. 300.

The appellees, in order to uphold the decree of distribution, apparently base some reliance, more or less remote, upon a "presumption" that a notice of some



kind, which does not appear in the record, was posted in connection with the so-called "supplemental petition for distribution," which was filed *after* the filing of the final account. [Tr. pp. 653-656, 657-660.]

There is no provision in the statute permitting any petition for distribution to be heard and allowed at the time of settling the final account, unless the same is filed *with* the final account.

Code of Civil Procedure, Sec. 1634 (*supra*);  
Estate of Shied, 122 Cal. 531.

The purported decree of distribution does not recite that the notice required by law was given [Tr. p. 663], and the fact of the giving of such notice has not been shown by extrinsic proof. The record shows the posting of a void notice [Tr. p. 661], and this court cannot indulge the presumption that any other notice was posted or that the court acquired jurisdiction to enter a decree of distribution.

At the trial the appellees contended that the decree of distribution and the final discharge of the administrator were sustained (1) by the presumptions stated in section 1963 of the Code of Civil Procedure, (2) by the entries in the register of actions, (3) by the evidence of a deputy county clerk whose duty it was to post notices in probate proceedings.

(1) The presumptions stated in section 1963 of the Code of Civil Procedure do not sustain the decree.

The Supreme Court of California has taken a different view from that advanced by the appellees.

In *Estate of Sharon*, 179 Cal. 447, 458, it is held that the presumptions stated in section 1963 “that official duty has been performed” (subdivision 15), and “that a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction” (subdivision 16), “are not to be construed to dispense with the necessity of proof of the facts essential to the *jurisdiction* of an inferior court or tribunal,” but that these provisions “apply only to the acts of such inferior court *after jurisdiction of subject matter and person has attached.*” It was further held that the fact that the inferior tribunal acted does not raise the presumption that the jurisdictional facts existed, but that such facts must be proven, either by the record or by other evidence.

In the *Sharon* case the court said:

“In no case has it been held that the fact that a judgment or order was made and that it appeared on the record, or the presumption that official duty has been regularly performed, was sufficient proof of the jurisdiction of an inferior court or tribunal.”

The law will presume in favor of the regularity of an official's act, but *it will not presume in favor of jurisdiction to perform the act.*

1 Jones on Evidence, §45a.

Where one relies on an adjudication of a court of limited or special jurisdiction, including the Superior Court acting in the administration of estates, every

fact necessary to confer jurisdiction must be shown affirmatively.

Estate of Sharon, 179 Cal. 447, 457.

(2) The entries in the register of actions do not supply the necessary proof of the posting of the notice.

The purported "supplemental petition" bears the endorsement that the hearing of the same was set by the clerk for the 22nd day of September, 1909. [Tr. p. 660.]

The record does not show that any notice of the hearing of this purported "supplemental petition" was ever given.

In order to supply this defect, the appellees offered at the trial the testimony of Charles Glaze, formerly deputy county clerk, and also a certified copy of the entries on the register of actions in the matter of the estate of Jeanette Fensky, deceased. [Tr. p. 741.] The entries in the register of actions applicable to this matter are as follows:

Sept. 8 1st & Final acct. & Report & Petn. for Dist.  
filed

" 11 Supplemental petition for dis filed

" 11 Notice set final acct. hearing pet & aff filed

" 13 " hearing pet for dis filed

" 22 Acct. settled & dist. ordered

The foregoing entries in the register of actions do not show that any notice of the hearing of the "supplemental petition" was given.

Nowhere in the register of actions does it appear that the supplemental petition was set for hearing, nor does it appear that any notice of hearing was given. It does not even appear that the notice which seems to have been filed on September 13<sup>th</sup> was ever posted or that any affidavit was attached to the said notice. The inference is that no affidavit was attached thereto, because in the entry of September 11<sup>th</sup>, it appears that an affidavit *was* annexed to the notice filed on that day. The only notice filed on September 11<sup>th</sup> was the one hereinbefore referred to, which purports to give notice of the hearing on *July* 22<sup>nd</sup>, instead of September 22<sup>nd</sup>. [Tr. p. 661.]

The register of actions fails to supply the deficiency for other reasons. It does not indicate the form or the contents of the notice; it does not show that legal service or any service thereof was made; it does not show when or where or for what length of time the notice was posted, if at all, and does not show that the same was ever posted; neither does it show that the notice contained the matters required by section 1634 of the Code of Civil Procedure to be contained therein.

There is no presumption in favor of jurisdiction, but the facts conferring jurisdiction must be made to appear.

Estate of Sharon, 179 Cal. 447.

Even if a notice of the hearing of the "supplemental petition" was posted we cannot presume that it was posted ten days, as required by statute, before



September 22nd. Aside from the void notice, which was filed September 11th, the only notice referred to in the register of actions was filed September 13th, —less than ten days prior to the 22nd.

Furthermore, the register of actions is not a part of the record and does not constitute evidence of the performance of any act. However, considering it for what it may be worth, it does not show the *posting* of any notice of the time and place of the hearing of the so-called “supplemental petition.” It merely shows [Tr. p. 742] that on September 13, “notice hearing set for dis filed.” This would not give the ten days’ notice required by section 1634 of the Code of Civil Procedure. If from this entry we might presume that a notice of the hearing of the petition for distribution was filed, we cannot presume that the notice was posted or that any proof of posting was ever made; neither can we presume that any notice of the hearing of the final account was given other than the void notice [Tr. p. 661], which was filed September 11, 1909 [Tr. p. 662], an entry of which appears on the register of actions as of that date. [Tr. p. 742.]

From the recitals in the register of actions alone, the court could not have made a finding that due and legal notice of the hearing had been given.

(3) The evidence of the deputy county clerk does not establish the posting of a valid notice.

Mr. Glaze who, in September, 1909, was assistant clerk in Department 2 of the Superior Court of Los

Angeles county, was called as a witness by the appellees in their efforts to show that a notice of the hearing of the supplemental petition for distribution was given. [Tr. p. 739.] Mr. Glaze testified concerning a custom of the county clerk's office with reference to the manner in which papers were stamped and the manner in which notices were made out and posted. He stated that *after* September 11th., 1909, he did not post "any notice in the matter of the estate of Jeanette Fensky of a hearing for final distribution." [Tr. p. 739.] Mr. Glaze produced a blank notice of hearing which he stated was the form which he used in giving notice of the hearing of the supplemental petition. [Tr. p. 743.]

If it be true that the blank form produced by the witness was used in giving the notice of hearing of the supplemental petition, it is wholly insufficient. It does not purport to give notice of the settlement of the final account, or the day appointed for the hearing thereof, as provided in section 1633 and 1634 of the Code of Civil Procedure, *supra*. The blank form produced by the witness is a form of notice that a petition for "*final distribution*" will be heard, but no mention is made of the *final account*.

If the account be for a *final settlement* accompanied by a *petition for distribution*, the notice must *state those facts*, and must be for at least the time prescribed by the statute.

Code of Civil Procedure, Sec. 1634, *supra*;  
Estate of Grant, 131 Cal. 426, 429.

The form of notice that the appellees are asking this court to presume was posted does not purport too meet the requirement of the statute.

The situation in the instant case is very similar to that in *Estate of Sharon*, 179 Cal. 447, where an attempt was made, as here, to prove the jurisdiction of the court by the evidence of two deputy county clerks who, some years previously, had seen the papers that were later destroyed; one of them had made entries in the "rough minutes" of the court, concerning the proceeding, and the other had filed and indexed the papers; neither of them could state what was contained in any of the papers. The court held that this evidence did not constitute secondary proof of the contents of the lost papers, nor did it establish the jurisdiction of the court.

Furthermore, Mr. Glaze expressly stated that he could only say "approximately, but not absolutely, what the contents of that notice were." [Tr. p. 740.] This same witness was the deputy clerk who prepared and posted the notice of hearing of the final account and petition for distribution in which he gave notice that the same would be heard *July* 22, instead of *September* 22. [Tr. pp. 661, 662.] We cannot assume that Mr. Glaze was more accurate in preparing the notice of hearing of the supplemental petition than he was in preparing the notice of hearing of the original petition.

That Mr. Glaze was testifying only concerning the custom of the county clerk's office, and not from any

definite recollection of his own, is further shown by the cross-examination. [Tr. p. 745.] He again stated that he had no recollection as to the contents of the notice, and that he knew that he posted a notice on September 11 by the record on the back of the petition itself and the record in the register of actions, and the fact that he was the only one doing the posting at that time. [Tr. p. 745.] He stated, however, that another person filled in the date in the rubber stamp on the petition itself, that none of the handwriting of the witness was on any of the documents and that the register of actions was not posted by him. [Tr. pp. 745, 746.]

He also testified on cross-examination: "*So far as the filling in of the blanks is concerned, I could not state what was contained in the notice. That was too far along.*" [Tr. p. 748.]

Mr. Glaze's evidence does not sustain the appellees' contention that this court must presume that proper notice was given, notwithstanding the failure both of the decree and the record to show such notice. His evidence is extremely uncertain as to the posting of any notice at all, and if any notice was posted the form produced by him [Tr. pp. 743, 744] did not comply with the requirements of section 1634 of the Code of Civil Procedure.

The notice of the hearing of the final account and petition for distribution is void; the purported "supplemental petition" for distribution did not contain a final account; neither the so-called "supplemental petition"



nor any other petition for final distribution could legally be filed until *after* the final account had been settled (C. C. P. 1665); a notice of the hearing of the “supplemental petition” was not given; even if such notice had been given, it would not confer jurisdiction upon the court to settle the final account, and therefore no jurisdiction would be acquired by the court to make an order for final distribution; the purported decree settling the final account and for distribution does not recite that due notice was given; the register of actions is not evidence of the doing of any act, and even if it were, it does not show that any notice was given or that an affidavit of posting was ever made or filed other than the affidavit of the posting of the void notice. Mr. Glaze’s testimony only shows a custom of the county clerk’s office, and he does not attempt to testify as to what actually was done beyond what appears upon the record; the court was without jurisdiction to settle the final account; and its purported order settling the same is void; the court had no power to order a distribution until the final account was settled, and the purported decree of distribution is therefore void.

**The Jurisdiction of This Court Is Not Ousted Because the Proceedings in the Matter of the Probate of the Estate of Jeanette Fensky Are Still Pending.**

The appellee, Merriam, administrator of the estate of Jeanette Fensky, denies the rights of the appellants in any property of the estate. He is proved to have

been guilty of concealing, of failing to collect and of failing to account for property and assets of the estate, and of aiding and abetting persons who are not heirs in acquiring and retaining property belonging to the estate.

In cases of this character there is no question but that federal courts of equity have jurisdiction over the parties and the subject matter in controversy, notwithstanding the pendency of the probate proceedings. A non-resident victim of fraud, deceit, or even of mistake, cannot be compelled to submit himself to the jurisdiction of the state courts of the state wherein the fraud or mistake occurred. It is not only the right of the federal court to exercise jurisdiction in such cases, but it is its duty so to do.

Green's Admr. v. Creighton, 64 U. S. (23 How.) 90, 16 L. Ed. 419;

Waterman v. Canal Bank, 215 U. S. 33, L. Ed. 80;

McClellan v. Carland, 217 U. S. 268, 54 L. Ed. 762;

Snydam v. Broadnax, 39 U. S. (14 Pet.) 67, 10 L. Ed. 357;

Ingersoll v. Coram, 211 U. S. 335, 53 L. Ed. 208.

It appears to be the law settled by numerous decisions that Federal courts of equity have original jurisdiction over executors and administrators appointed by state probate courts, such executors and administrators being considered as trustees in favor of heirs, creditors, etc. of the estate.

The case of *Green's administratrix v. Creighton*, 23 Howard, 90, which was an action to establish a judgment against an administrator and the breach of his administrator's bond, and to seek discovery of the assets and an accounting, the court, in answer to the contention that the pendency of proceedings in the probate court might oust the jurisdiction of the Circuit Court of the United States, and referring to the case of *Suydam v. Broadnax*, 14 Pet. 67, said:

"This court declared that the eleventh section of the act to establish the judicial courts of the United States, carries out the constitutional right of a citizen of one state to sue a citizen of another state in the Circuit Court of the United States. 'It was certainly intended,' say the court, 'to give to suitors having a right to sue in the Circuit Court remedies co-extensive with those rights. These remedies would not be so, if any proceedings under an act of a state legislature to which a plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the Circuit Court.'"

A leading case on this subject is that of *Payne v. Hook*, 7 Wallace 425. The facts in this case are not at all unlike the case at bar. In this case a citizen of Virginia filed a bill in equity in the United States courts of Missouri against the administrator and sureties on his bond to obtain for the complainant her distributive share in the estate of her brother. The plaintiff charged gross misconduct on the part of the administrator in making false statements, using money of the

estate for his private gain, and, that he “obtained through the use of false representations a receipt in full for her share of the estate, on the payment of a less sum than she was entitled to receive.” The object of the bill was to obtain relief against these fraudulent proceedings, and to compel a true account of administration, “in order that the real condition of the estate can be ascertained, and the complainant receive what justly belongs to her.”

On appeal from the decree dismissing the bill, the Supreme Court, in reversing the decree, said:

“We have repeatedly held ‘that the jurisdiction of the courts of the United States over controversies between citizens of different states, cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.’ If legal remedies are sometimes modified to suit the changes in the laws of the states, and the practice of their courts, it is not so with equity. The equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitations or restraint by state legislation, and is uniform throughout the different states of the union.

“The Circuit Court of the United States for the District of Missouri, therefore, had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it, if the bill, according to the received principles of equity, states a case for equitable relief. The absence of a com-



plete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case, as disclosed in the pleadings.

“It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity.”

The opinion and decision in this case is frequently followed; notably in the case of *Waterman v. Canal Bank*, 215 U. S. 33, in which case, at pages 45-46 and 47, the court said:

“The complainant, a citizen of a different state, brings her bill against the executor and certain legatees named, who are likewise citizens of another state, and are all citizens of Louisiana, where the bill was filed, except one, who was beyond the jurisdiction of the court, and for the reasons stated in her bill she asks to have her interest in the legacy alleged to be lapsed and the residuary portion of the estate established.

“This controversy is within the equity jurisdiction of the courts of the United States as heretofore recognized in this court, and such jurisdiction cannot be limited, or in any wise curtailed by state legislation as to its own courts. The complainant, it is to be noted, does not seek to set aside the probate of the will which the bill alleges was duly established and admitted to probate in the proper court of the state.

“The United States Circuit Court, by granting this relief, need not interfere with the ordinary settlement of the estate, the payment of the debts

and special legacies, and the determination of the accounts of funds in the hands of the executor, but it may, and we think has the right to determine as between the parties before the court the interest of the complainant in the alleged lapsed legacy and residuary estate, because of the facts presented in the bill. The decree to be granted cannot interfere with the possession of the estate in the hands of the executor, while being administered in the probate court, but it will be binding upon the executor, and may be enforced against it personally. If the Federal Court finds that the complainant is entitled to the alleged lapsed legacy and the residue of the estate, while it cannot interfere with the Probate Court in determining the amount of the residue arising from the settlement of the estate in the court of probate, the decree can find the amount of the residue, as determined by the administration in the Probate Court in the hands of the executor, to belong to the complainant, and to be held in trust for her, thus binding the executor personally, as was the case in *Payne v. Hook*, 7 Wall, 425, *supra*, and *Ingersoll v. Coram*, 211 U. S. 335, *supra*.

“It is to be presumed that the Probate Court will respect any adjudication which might be made in settling the rights of parties in this suit in the Federal Court. It has been frequently held in this court that a judgment of a Federal court awarding property or rights, when set up in a state court, if its effect is denied, presents a claim of Federal right which may be protected in this court.”

This case has been followed by the United States Supreme Court in the case of *McClellan v. Carland*, 217

U. S. 268. In fact, we think that it has been so definitely decided by numerous decisions that the Federal courts have jurisdiction over the parties, subject matter and the question in controversy in cases of the character of the one at bar, that the right of the court to exercise such jurisdiction and in fact that it is its duty to do so, can no longer be questioned.

We have previously herein discussed the invalidity of the pretended decree of distribution in the estate of Jeanette Fensky, invalid by reason of the fraud and the void notice of hearing of the final account and petition for distribution. Even though, for this reason, the proceedings for the probate of the estate of Jeanette Fensky, in California, are still pending, the appellants, being non-residents of the said state, cannot be forced to submit their controversy to the state courts; and because of the nature of the case the Federal court has jurisdiction to determine the interests in the estate to which the appellants are entitled and any decree of this court will be respected by the state court.

**J. H. Merriam, Administrator of the Jeanette Fensky Estate, Should Be Held to Account to These Appellants for All the Property of That Estate, Which Includes the Land Described in the Void Deeds, Certain Promissory Notes and Property Which Was Concealed and Have Never Been Accounted for by Him.**

His accountability sought by the complainants and proven by this record is based upon his mal-administra-

tion, his concealment of the property, his intentional diversion of it from the assets of the estate, the suppression of knowledge of those assets from the court and from these complainants and intervenor who had no knowledge of their existence or as belonging to the estate until 1912, long after administration. His omission to inventory the property renders it imperative that he make this accounting, the record shows that those omissions were purposely done and that he fraudulently concealed the property and diverted it to the great detriment and loss of these complainants and intervenor. This accounting should charge him with the full value of all this property thus sequestered by such violation of his duty.

A few days after the death of Jeanette Fensky, he was, at the instance of several of the defendants, appointed administrator of her estate, and thereupon contemporaneously was employed by the defendants to act as their individual attorney in reference to their pretended interest claimed in the estate and was paid by them retainers at that time to act in that capacity as attorney. This placed him in an attitude where his duties to those who retained him were to advance their pretended interests in the estate preferentially to any other claimants and prevented him from acting in a disinterested manner in the administration on behalf of all the heirs, the true heirs and beneficiaries, whether to him known or unknown, and thus having caused the opportunity to do wrong he grasped it and perpetrated the wrong and become subservient to



and acted solely according to the desires and interests of his clients and in doing so sacrificed the rights of these appellants and their co-heirs. By becoming such attorney he did a wrong act and placed himself in an attitude gravely suspicious where the interests of his clients were in conflict with his duty to other persons, who were these appellants and their co-heirs, and for whom as administrator he was trustee. He thus created that unlawful opportunity to do wrong and thereupon took advantage of it and perpetrated the wrong to solely benefit his clients and he colluded and conspired with the other defendants to defraud these appellants and their co-heirs mentioned, of both estates, of their rights and interests all merged in the property of the estate of Jeanette Fensky to which they were the heirs and owners by descent from her, and which were impressed with the trust heretofore shown in this brief.

Merriam and the other defendants all dreaded not only the possibility, but the certainty of a demand by these appellants and their said co-heirs for their said rights and interests in the event that he inventoried and thus divulged the existence of the property included in those void deeds as a part of the estate so that it would openly appear as forming a part of that estate, and therefore, collusively and under the advice of Merriam, that property was omitted and fraudulently excluded from the inventory and administration in order to dispose of it surreptitiously through the medium of those worthless deeds, to the exclusive

benefit of the defendants. Accordingly those deeds were fraudulently and by legerdemain foisted into apparent validity by the post-mortem so called, delivery and *that too*, an impossible and an imaginary one, thereby to deceive and defraud, of course, the appellants of their rights in that property. This is the only reasonable deduction there can be no other. Of course it was not necessary for appellants to show this actual fraud and fraudulent intent, for it is undeniable, as a matter of law, that if the omission to include property in the estate was the result merely of mistake or accident or that it had been subsequently discovered property, nevertheless Merriam would be held liable in that case if he was inexcusably negligent in the exercise of his duty, and yet the fraud adds aggravation to his acts and omissions and, as almost always fraud works in secret ways its designs to accomplish, so did it work in this instance to the exclusion of these complainants forever from their property, had it not been discovered by them and had not immediate action been taken by them thereon in this suit.

That Merriam and the other defendants knew that this property was derived from the estate of Ferdinand Fensky and came to Jeanette Fensky from him and that they knew also of the trust impressed by reason of the fraudulent procurement of quitclaims by her from appellants, as to the property which came by descent from him to them, appears further from all of their conversations, acts and conferences with reference to her source of property as being through her

husband's estate, consisting partly of the *identical property* as to two parcels particularly, and the remainder of the avails of that property so derived by her from him, and that she had no other property acquired from any other source, and in this connection Merriam also knew and is conclusively chargeable with knowledge as a lawyer that the quitclaim deeds executed by the complainants of their interest in the estate of Ferdinand Fensky, even though they had not been fraudulently obtained by misrepresentation and concealment, as proven that they were so obtained, passed no interest of any kind that came by descent to them five years subsequently from the intestate Jeanette Fensky. [~~Tr. p. 610.~~] (McKenzie v. Budd, 125 Cal. 600.)

The letter of Merriam to Campbell [Tr. p. 610] shows conclusively that Merriam knew that Jeanette Fensky had not made any lawful disposition of her property, but that the deeds and papers were signed by her under the mistaken view that they would have the same effect as a will. He testified that he was employed by the relatives of Jeanette Fensky [Tr. p. 612] and that it had been arranged that he was to be administrator of her estate and that, "I think I advised them (the defendants) to carry out in good faith what the effort of Mrs. Fensky was to dispose of her property in the way that this was done." [Tr. p. 619.] Thus he was *substituting for the performance of his duty to the estate of Jeanette Fensky, his advice to these persons*, for whom he had accepted employ-

ment as attorney, to take this property under those worthless deeds and which they all knew were void, instead of accounting for the property and administering thereon.

Also [Tr. p. 460] see the diary of Campbell that he met Merriam and Thompson at the Hollenbeck and while they were together he told Thompson about the "Kansas Fensky heirs." The above facts in conjunction with the certainty and even the necessity of Merriam having to ascertain the source whence came the property of Jeanette Fensky which was by the decree of distribution of her husband's estate in Los Angeles county as her basic muniment of title.

Now we contend that these acts and omissions and concealments of Merriam positively show actual fraudulent motives in their doing and we therefore contend that even though had he not been chargeable with knowledge as to who were the true heirs and owners and had not specifically known by name who they were nor whom he was defrauding, yet he was defrauding those who were entitled to this property and that he knew he was defrauding them. We also contend that if he had not even intended so to defraud, yet his acts and omissions and concealments would have been constructive fraud and that in either case a court of equity would hold him to rigid account to those who had thus been deprived of their property by his acts. It is not necessary to cite any other authority to sustain our contention in these respects than the decision in this very case on appeal to the Circuit Court



of Appeals of *Pickens v. Merriam*, 242 Federal Reporter, 363 as that case substantiates every position here announced and cites ample authority to uphold it, and every averment in the bill of complaint in this case has been amply proven.

The defendants themselves, by their own testimony, have verified every act of concealment and fraud of which they are charged.

**The Decree of a Probate Court Distributing an Estate and Settling the Account of the Administrator Is Not Conclusive, but, if Obtained by Means of Fraud or Mistake, a Court of Equity Will Grant Proper Relief Against the Same.**

The honorable trial court held, as is shown by his opinion rendered herein [Tr. pp. 198, 199], that the decrees in the estates of Ferdinand Fensky and Jeanette Fensky were binding and conclusive upon the appellants. That would be true except for the existence of facts and circumstances warranting the interposition of a court of equity.

This court has said in the former appeal of this case, *Pickens v. Merriam*, 242 Fed. 363:

*“that the settlement of an administrator’s account by the decree of a probate court does not conclude as to property accidentally or fraudulently withheld from the account.”*

We have shown by the evidence in this case that the decrees of distribution in the estates of both Ferdinand Fensky and Jeanette Fensky were obtained

through fraud, misrepresentation and concealment, deliberately planned and carefully executed, by means of which the appellants and others have been deprived of a large amount of money and property.

We think the case of *Pickens v. Merriam*, *supra*, and the case of *Griffith v. Godey*, 113 U. S. 89, cited by this court in that case, is conclusive upon the question.

In the case of *Pickens v. Merriam*, *supra*, this court, quoting from the case of *Griffith v. Godey*, 113 U. S. 89, 28 L. Ed. 934, said:

“It is well established that a settlement of an administrator’s account, by the decree of a probate court, does not conclude as to property accidentally or fraudulently withheld from the account. If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased or to the creditors of the estate may require, even if the probate court might, in such case, open its decree and administer upon the omitted property. And a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity.”

It will be noted that the complainants in the action at bar do not ask that any decree of court be vacated. They simply ask that the property belonging to the estate of Ferdinand Fensky and Jeanette Fensky that was never inventoried or accounted for, be now ac-

counted for by the holders thereof.\* The trial court did not pass upon the question as to whether or not the property that belonged to the estate of Ferdinand Fensky but converted by Jeanette Fensky to her own use and benefit, actually belonged to the estate of Jeanette Fensky or not; nor whether the property attempted to be conveyed in the deeds executed by Jeanette Fensky to the defendants but not attempted to be delivered until after her death, really belonged to the estate of Jeanette Fensky, or whether or not the grantees under such deeds were accountable to the estate of Jeanette Fensky for the same.

Even though it be conceded for the sake of the argument that no fraud had been perpetrated upon these complainants by Jeanette Fensky in obtaining the releases of the interests of complainants in the estate of Ferdinand Fensky, yet complainants would not be barred from the relief asked for in this action, for these releases could only bind complainants as to the property actually inventoried and distributed in the estate of Ferdinand Fensky, and could not in any way affect their rights in the property belonging to the estate of Jeanette Fensky and which was never distributed through the estate and which was fraudulently converted by the said J. H. Merriam, and to the use and benefit of the other defendants.

It appears to us that this case falls clearly within the rules laid down in the cases of

Wingerten v. Wingerten, 71 Cal. 105;

Lataillade v. Orena, *supra*; 91 Cal. 265;

Certis v. Shell, 129 Cal. 208;  
Griffith v. Godey, 113 U. S. 89;  
Wickersham v. Comerford, 96 Cal. 439;  
Marshall v. Holmes, 141 U. S. 589.

In this latter case, at page 598, the court says:

“The rules laid down in Barrow v. Hunton were applied in Johnson v. Waters, 111 U. S. 640, 667, and Arrowsmith v. Gleason, 129 U. S. 86, 101. In Johnson v. Waters, this court upheld the jurisdiction of the Circuit Court of the United States, by a decree in an original suit, to deprive parties of the benefit of certain fraudulent sales made under the orders of a Probate Court of Louisiana, which court, by the law of that state, had exclusive jurisdiction of the subject matter of the proceedings out of which the sales arose. After observing that the Court of Chancery is always open to hear complaints against fraud, whether committed *in pais* or in or by means of judicial proceedings, the court said: ‘In such cases, the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment, or decree, it will deprive them of the benefit of it.’ In Arrowsmith v. Gleason, the grounds of the jurisdiction of the Circuit Court of the United States to entertain an original suit—the parties being citizens of different states—to set aside a sale of lands fraudulently made by the guardian of an infant, under authority derived from a Probate Court, are thus stated: ‘These principles control the present case, which,



although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise, from time to time, of the authority so obtained. As the case is within the equity jurisdiction of the Circuit Court, as defined by the Constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel them to do what according to the principles of equity they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion.' "

It will be seen from the above that the Federal courts have adopted a liberal policy in relieving a party from the effects of a judgment or decree obtained by fraud.

In concluding this subject we again refer to the case of *Pickens v. Merriam*, in which this court specifically held that if by fraud, accident or mistake, the complainants had been deprived of property, that relief would be granted, and that the administrator of Jeanette Fensky's estate, the appellee Merriam, must be held to account for the property of that estate, for which he had not accounted.

In the case at bar the complainants only ask that the property belonging to the estate of Ferdinand Fensky that was never accounted for by the admini-

stratrix, Jeanette Fensky, and which has since come into the hands of these defendants, be now properly accounted for. This is relief of a character that has always been granted by courts of equity of California and by the Federal courts.

The principles laid down in the case of Lataillade v. Orena, *supra*, are peculiarly applicable to the case at bar. The facts of this case have already been stated. On the question of jurisdiction of the court of equity to compel the accounting, the court, at page 576, says:

“The respondent contends that the Probate Court had exclusive jurisdiction to compel defendant to account as guardian, and that its decree, settling his accounts and discharging him from his trust, was final and conclusive; and in support of this position numerous authorities are cited. This is undoubtedly the general rule applicable to the settlement of the account of guardians, executors, and administrators, but we do not think it applicable to a case like this. Here, if the averments of the complaint are true,—and they must be assumed to be so for the purposes of this decision,—none of the matters now in controversy were passed upon in the settlement, for the reason that the guardian intentionally and fraudulently concealed from the court and his ward the fact that the latter had then or ever had any interest in the property in question. The cases cited state and apply the general rule, but, so far as we have discovered, no one of them goes to the extent of holding that such a settlement can shield a guardian from afterwards being called upon in a court

of equity to account for the property so concealed. (And see *Estate of Hudson*, 63 Cal. 454; *Dean v. Superior Court*, 63 Cal. 473; *In re Cahalan*, 70 Cal. 604; *Tobleman v. Holdebrandt*, 72 Cal. 316.)”

It appears to us that this case, and that of *Griffith v. Godey*, cited in the opinion of this court in the former appeal, are conclusive upon this question.

The appellants did not have any notice or knowledge of the truth respecting the amount, extent and value of the estate of Ferdinand Fensky, nor of the frauds committed upon them by Campbell, Jeanette Fensky and defendant Merriam, until July or August, 1912; and not until 1913 did they have any notice or knowledge that the deeds signed by Jeanette Fensky were not delivered during the lifetime of said Jeanette Fensky. [Tr. pp. 280, 281, 542, 543.] In 1912 one of the daughters of the appellant, Louisa Pickens, was visiting in Los Angeles and by chance came into the possession of the correspondence that passed between Campbell and Jeanette Fensky during the time the estate of Ferdinand Fensky was in probate, which disclosed a part of the fraud committed by Campbell and Jeanette Fensky. [Tr. pp. 280, 281, 283-289.] An investigation was thereupon begun which resulted in the commencement of this action.

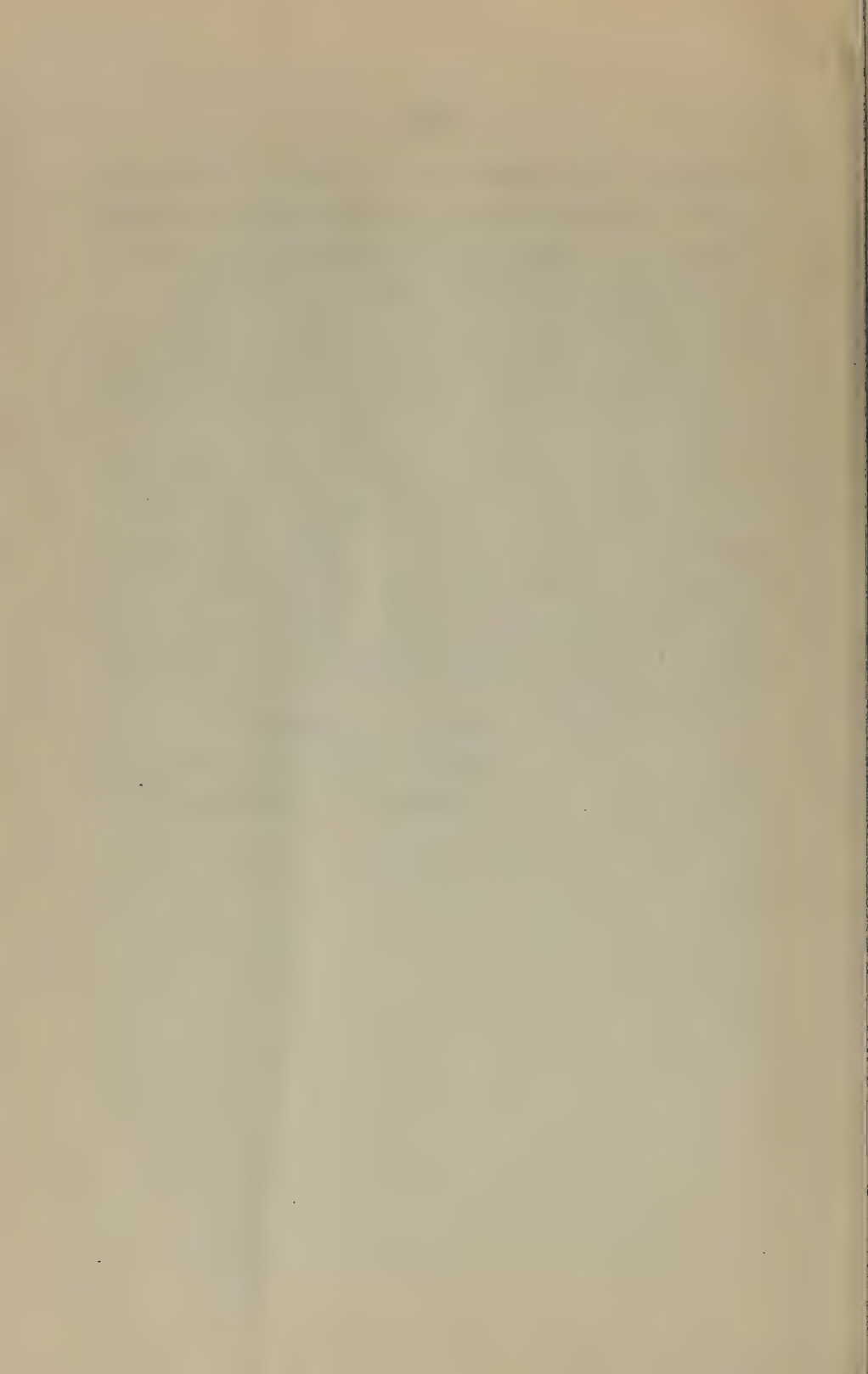
We accordingly, in closing this brief, reiterate with all sincerity and earnestness that the history of this case, as here represented, presents a series of iniquitous acts of plunder to the detriment of appellants and the

co-heirs of Ferdinand Fensky which, for subtleness and dexterity and iniquity, would be difficult to parallel and that it is obvious that the appellants are entitled to their full distributive shares of their deceased brothers<sup>state</sup> and to their distributive share of the estate of Jeanette Fensky, deceased, and to such other and further relief as to the court may seem equitable and just.

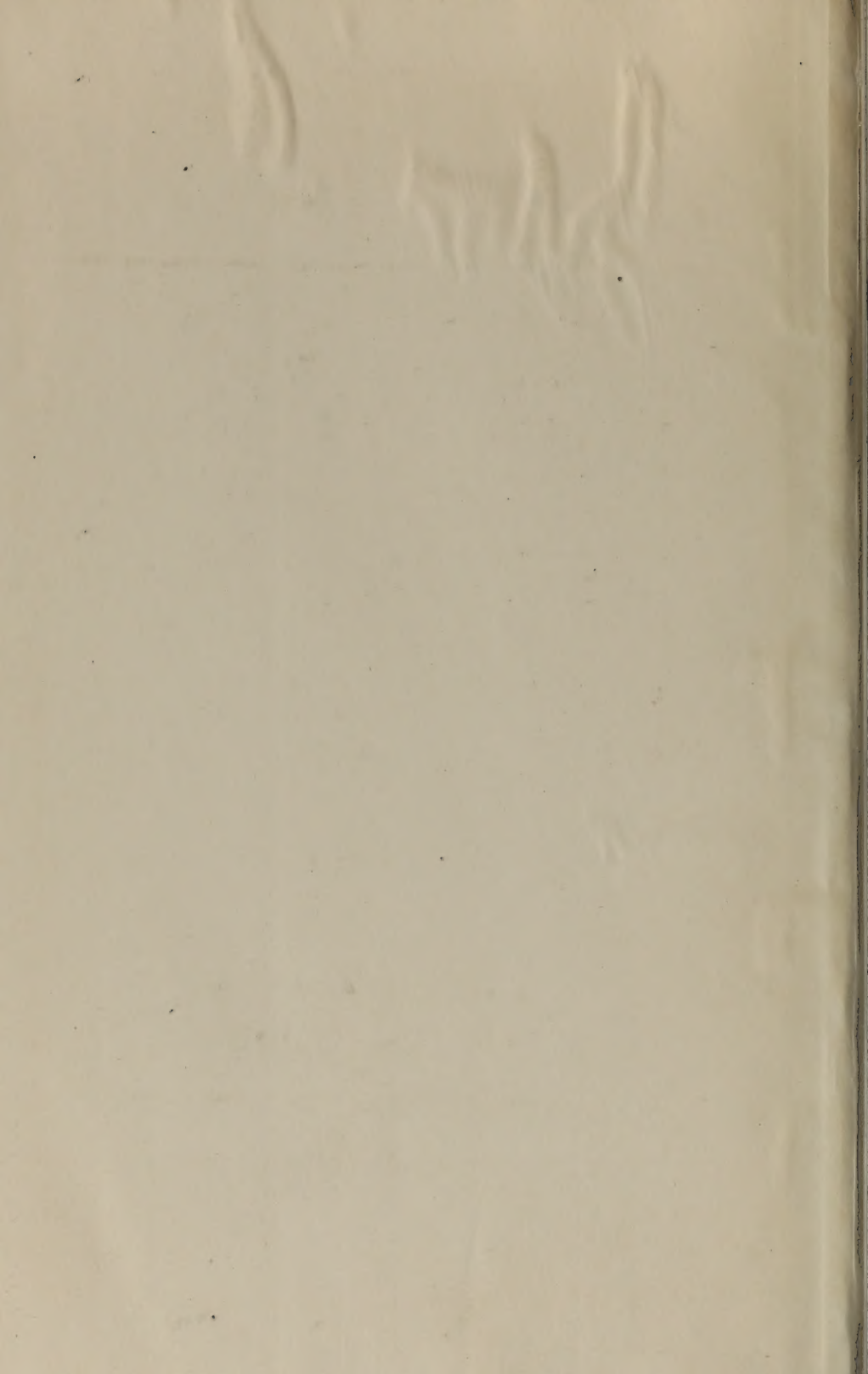
We most respectfully submit that the Honorable Trial Court erred in entering the decree in favor of the defendants, and in entering the final decree of dismissal [Tr. pp. 199, 200], and that the cause is sufficient in every respect to justify the interposition of a court of equity, and that the complainants are entitled to relief as prayed.

FRANCIS G. BURKE,  
*Attorney for Complainants and  
Appellants and Intervenor.*









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